Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MADISON HOBLEY,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for a Writ of *Certiorari* to the Supreme Court of Illinois

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether the trial court's failure to instruct the jury at the eligibility phase of the death penalty proceedings that, if Petitioner was not found eligible for the death penalty, then he would be sentenced to natural life imprisonment without the possibility of parole, violated the Eighth Amendment's requirements in capital cases.

2. Whether Respondent's nondisclosure and intentional concealment of the fingerprint testing and evidence violated Petitioner's right to due process under either *Brady v. Maryland* or *Arizona v. Youngblood*.

LIST OF PARTIES

Petitioner Madison Hobley was the defendant/ appellant in the proceeding below. Respondent People of the State of Illinois was the plaintiff/appellee in the proceeding below.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MADISON HOBLEY,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF ILLINOIS

Petitioner Madison Hobley respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of Illinois entered in the above-entitled proceeding on March 31, 1994.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 1994 WL 106576 (Ill. March 31, 1994), and is reprinted in the Appendix hereto at page A-1, *infra*.

The order of the Supreme Court of Illinois denying Petitioner's Petition for Rehearing, dated May 27, 1994, is reprinted in the Appendix hereto at page B-1, *infra*.

The Judgment and Execution Order of the Circuit Court of Cook County, Illinois, dated October 9, 1990, is reprinted in the Appendix hereto at page C-1, *infra*.

JURISDICTION

Petitioner appealed to the Supreme Court of Illinois from the Judgment and Execution Order entered by the Circuit Court of Cook County, Illinois on October 9, 1990 finding Petitioner guilty of murder and sentencing him to death by lethal injection. See p. C-1, *infra*.

The Supreme Court of Illinois affirmed Petitioner's convictions and death sentence on March 31, 1994. See p. A-1, *infra*. On April 14, 1994, Petitioner filed a timely Petition for Rehearing. On May 27, 1994, the Supreme Court of Illinois denied the Petition for Rehearing. See p. B-1, *infra*.

On June 6, 1994, Petitioner filed a motion to stay the issuance of the mandate with the Supreme Court of Illinois pending *certiorari* proceedings. On June 14, 1994, the Supreme Court of Illinois stayed issuance of the mandate pending the filing of a timely petition for writ of *certiorari*.

Petitioner invokes the jurisdiction of this Court to review the judgment and order of the Supreme Court of Illinois under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The Eighth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution are reprinted in the Appendix hereto at page D-1, *infra*.

730 Illinois Consolidated Statutes (ILCS) 5/3-3-3 is reprinted in the Appendix hereto at page E-1, *infra*.

730 Illinois Consolidated Statutes (ILCS) 5/5-8-1 is reprinted in the Appendix hereto at page F-1, *infra*.

STATEMENT OF THE CASE

On February 18, 1987, Petitioner Madison Hobley was charged by indictment in the Circuit Court of Cook County, Illinois with murder, arson and aggravated arson in connection with a January 6, 1987 apartment building

fire in Chicago, Illinois. On February 23, 1991, Petitioner entered a plea of not guilty to all charges.

At trial, the prosecution presented police testimony that Petitioner confessed to setting the fire by pouring gasoline in the apartment building stairwell and outside his third floor apartment, lighting the gasoline, and throwing the gasoline can down the second floor hallway. However, the police witnesses produced no written or recorded evidence of Petitioner's purported confession. One police officer's notes simply stated that Petitioner made "admissions," while another officer claimed that he threw away his notes concerning Petitioner's alleged confession because they were wet and torn. Yet another officer's notes indicated that Petitioner denied involvement in the fire.

In an attempt to corroborate the testimony concerning Petitioner's alleged confession, a police officer testified that, on the day after the fire, he found a gasoline can on the second floor of the apartment building. However, the gasoline can was not found in the hallway where Petitioner allegedly had confessed to throwing it. Instead, the can was found under a sink inside a second floor apartment. The tenant of that apartment admitted that she owned a gasoline can, but denied that the can found in her apartment belonged to her. The prosecution also presented the testimony of two witnesses who purportedly saw Petitioner purchase gasoline and pump it into a can at a gasoline station.

Petitioner had made a pretrial discovery request for the results of all scientific tests, experiments and examinations conducted by the prosecution, including

fingerprint analysis. Petitioner also made a pretrial request for any evidence that might or would be favorable to the defense, and any material or information within the prosecution's possession or control which would tend to negate Petitioner's guilt or tend to reduce his punishment. However, it was not until the middle of Petitioner's trial that he learned that the gasoline can had been tested for fingerprints. A detective testified during the prosecution's case-in-chief that the gasoline can had been sent to the Crime Lab for fingerprint analysis. The detective further testified that the black powder visible on the gasoline can was actually fingerprint powder, and not soot from the fire as defense counsel had been led to believe. Petitioner moved that the trial court order the production of the results of the fingerprint analysis, but that motion was denied. Petitioner's subsequent motion for a mistrial also was denied. Although it claimed that it did not possess or know of any results from the fingerprint testing, the prosecution nevertheless argued at sentencing that Petitioner "chose not to leave his prints on the can."

The prosecution also presented several witnesses who testified concerning the cause and origin of the fire. After debris samples had been tested, it was determined that gasoline had been used as an accelerant to start the fire. The prosecution's witnesses stated that the exact ignition point could have been anywhere in the apartment building stairwell, but that a burn pattern had been created by a flammable liquid at the top of the stairwell near Petitioner's third floor apartment.

Petitioner testified that he had not set the fire, that he had never owned a gasoline can, and that he had never told any police officers that he had started the fire. John

Campbell, an expert in the field of fire investigation and analysis, testified for the defense. Campbell testified that gasoline poured in the third-floor hallway could not have caused fire damage to the extent that was found in that area. Instead, the stairwell caused a "chimney effect" resulting in extensive heat and damage at the top of the stairwell from gasoline ignited at a location below the third floor.

Campbell, however, was barred from stating his expert opinion that the gasoline can found by the police on the day after the fire could not have been located in the second floor hallway during the fire. The trial court ruled that Campbell's opinions regarding the condition of the can and locations where it could not have been during the fire were speculative. The defense then made an offer of proof concerning Campbell's opinions. Campbell would have testified that the can had not been subjected to any significant heat or smoke damage. Accordingly, based on the evidence of the extensive fire damage to the second floor hallway, the can could not have been located in that burning hallway from the stairwell to the door of the apartment in which the can had been found.

The jury found Petitioner guilty of murder, arson and aggravated arson. At the first stage of the bifurcated sentencing hearing, the trial court gave the Illinois pattern jury instruction concerning eligibility for the death penalty. That instruction provided that, if the jury could not unanimously decide that Petitioner was eligible for the death penalty, a sentence "other than death" would be imposed. Petitioner requested that the trial court modify that pattern instruction to reflect that the only alternative to the death penalty under Illinois law is natural life

imprisonment without the possibility of parole. The trial court denied Petitioner's motion. After receiving the trial court's instructions, the jury found that Petitioner was eligible for the death penalty. Evidence then was presented in aggravation and mitigation during the second stage of Petitioner's capital sentencing hearing. The jury subsequently returned a verdict of death.

Petitioner's motions for a new trial and new sentencing hearing were denied. The trial court entered judgment on the jury's verdicts on October 9, 1990. See p. C-1, *infra*.

Petitioner appealed his convictions and death sentence to the Illinois Supreme Court. On March 31, 1994, the Illinois Supreme Court issued its opinion affirming Petitioner's convictions and death sentence. In particular, the Illinois Supreme Court held that Petitioner was not denied due process by the prosecution's failure to produce the results of the fingerprint testing conducted on the gasoline can or concealment that testing was done. *See* pp. A29-A31, *infra*. The Court also affirmed the trial court's refusal to modify the pattern jury instruction given during the eligibility phase of Petitioner's sentencing hearing. *See* p. A42, *infra*. Petitioner's modified instruction would have informed the jurors that, if they could not unanimously decide that Petitioner was eligible for the death penalty, then Petitioner would be sentenced to life imprisonment without the possibility of parole.

On May 27, 1994, without comment, the Illinois Supreme Court denied Petitioner's Petition for Rehearing. See p. B-1, *infra*. That Court stayed the issuance of the

mandate pending the filing of a timely petition for a writ of *certiorari*.

REASONS FOR GRANTING THE WRIT

I.

Because the trial court failed to instruct the jury at the eligibility phase of the death penalty proceedings that, if Petitioner was not sentenced to death, then he would be sentenced to natural life imprisonment without parole, the jury's decision did not meet the requirements of the Eighth Amendment in capital cases.

During the eligibility phase of Petitioner's death penalty hearing, the trial court ignored the high standard of accuracy in sentencing information required by the Eighth Amendment. This Court has found that "[e]volving standards of societal decency have imposed a correspondingly higher requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills v. Maryland*, 486 U.S. 367, 383 (1988). Therefore, the jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). The decision to impose the death penalty must be thoughtful and informed in order to be reliable. Thus, to meet this standard of reliability and limit the jury's discretion, the Eighth Amendment requires

provision of "accurate sentencing information as an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Id.* at 190.

This Court recently considered the importance of accurate jury instructions in the death penalty context in *Simmons v. South Carolina,* 114 S. Ct. 2187 (1994). In *Simmons,* the defendant was only eligible for the death penalty or life imprisonment. Life imprisonment in South Carolina does not carry with it the possibility of parole. However, the trial court did not instruct the jury of this fact. This Court held that this was error and reversed the defendant's death sentence. Justice Souter, joined by Justice Stevens, wrote a concurrence holding that this violated the Eighth Amendment. Justice Souter noted that the Eighth Amendment gives each capital defendant the right to accurate instructions "whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term." *Id.* at 2198. Since statistics indicate that most jury-eligible adults do not understand that life imprisonment does not carry with it the possibility of parole, there was a reasonable likelihood that a juror will misunderstand what a life sentence entails. Justice Souter concluded that this jury instruction "diminished the reliability of the jury's decision that death, rather than th[e] alternative, was the appropriate penalty in this case." *Id.* at 2199. Therefore, the jury's verdict did not meet the heightened standard for reliability required by the Eighth Amendment.

Similarly, in Petitioner's case, the trial court did not provide the jury with accurate sentencing information required by the Eighth Amendment. In Illinois, the legislature has set out clear sentencing guidelines for

defendants convicted of multiple murders if the death penalty is not imposed: ". . . if the defendant . . . is found guilty of murdering more than one victim, . . . the court shall sentence the victim to a term of natural life imprisonment." 730 ILCS 5/5-8-1(c). Natural life imprisonment does not carry with it the possibility of parole. 730 ILCS 5/3-3-3 (d). Petitioner was convicted of multiple murders during the guilt/innocence phase of the trial. Petitioner was then sentenced in a separate death penalty proceeding, which is bifurcated into an eligibility phase and a mitigation/aggravation phase. Because Petitioner was convicted of multiple murders, a term of natural life imprisonment was the only alternative to the death penalty. However, the court did not instruct the jury at the eligibility phase that only two sentencing options were available to them. Instead, the trial court instructed the jury as follows: "If you cannot unanimously decide that the defendant is eligible for a death penalty under the law, then there will be no second part of the death penalty hearing and the court will impose a sentence other than death."(R. 2560). This instruction is far below the level of fairness and accuracy that the Eighth Amendment requires when a person's life is at stake.

In order for jurors to make a reliable decision, they must be fully and accurately informed. However, the Illinois Supreme Court has held that an instruction fully informing the jury of its sentencing alternatives is not necessary at the eligibility stage of death penalty proceedings. *People v. Lear,* 143 Ill.2d 138 (1991). That court has reasoned that "the jury is concerned with the threshold question of whether the defendant is even eligible for death." *Id.* at 151. However, if the jury is only concerned with a defendant's eligibility for the death

penalty, then there would seemingly be no reason to instruct them at all concerning sentencing alternatives. However, the trial court still instructed the jury that, in lieu of the death penalty, the court would impose a sentence "other than death." The court knew *precisely* what the sentencing options were, but the jury did not. In order to fully inform the jury in the eligibility phase, as the Eighth Amendment mandates, the trial court should have clearly and fully informed the jury of these two sentencing options.

Not only did the trial court fail to accurately inform the jury of the two sentencing options, but its vague instruction could have easily misled the jury and invited the probability of an unreliable decision. By not identifying the sentencing options precisely as the death penalty or natural life imprisonment without parole, the trial court left the jury to ponder the consequences of their decision if they did not find Petitioner eligible for the death penalty. A sentence "other than death" could literally mean a term of years. Jurors might have imposed the death penalty rather than risk even one day of freedom for Petitioner. Hence, a juror could have easily made his or her decision to sentence Petitioner to death laboring under a misconception based on a plain reading of the instruction that Petitioner would some day be free if the jury did not impose a death sentence.

Similarly, in *Simmons,* Justice Blackmun cited a South Carolina survey which showed that only 7.1 percent of all jury-eligible adults believed that a defendant sentenced to life in prison in South Carolina would stay in prison for the rest of his or her life. 114 S. Ct. at 2191. Additionally, seventy-five percent of those surveyed indicated that their capital sentencing decision would hinge

greatly on the amount of time a capital defendant would actually spend in prison. *Id.* These statistics bear out the absolute necessity of jurors receiving accurate information in order to make a reliable decision when a person's life hangs in the balance. Indeed, in his concurrence, Justice Souter expressed his concern about the tendency of inaccurate sentencing instructions to make sentencing less reliable. *Id.* at 2199. In giving a vague and inaccurate instruction to the jury in Petitioner's case, the trial court diminished the reliability of the jury's decision at the eligibility stage in violation of the Eighth Amendment.

II.

The State's nondisclosure and intentional concealment of fingerprint testing and evidence violated Petitioner's right to due process under either *Brady vs. Maryland* or *Arizona vs. Youngblood*.

The trial record unmistakably demonstrates that the State performed a fingerprint analysis on the gasoline can recovered from the scene of the fire which was never disclosed to defense counsel, despite specific requests for fingerprint evidence and evidence tending to negate Petitioner's guilt. The record also shows that the prosecutor knew about the fingerprint analysis and its results. Disturbingly, the prosecutor denied the existence of the fingerprint evidence when faced with a defense motion for mistrial based on the State's nondisclosure of this evidence. Nonetheless, the prosecution later argued to the jury that Petitioner "chose not to leave his fingerprints" on the gasoline can. (R. 2818). The nondisclosure of this

evidence greatly prejudiced Petitioner, since the gasoline can was the linchpin in the State's case against him. In light of not only a discovery violation, but a blatant attempt to conceal that violation, the failure of the courts below to find a violation of Petitioner's due process rights is clearly contrary to this Court's prior decisions.

The Illinois Supreme Court initially erred when it ruled that *Brady v. Maryland,* 373 U.S. 83 (1963), was not determinative of Petitioner's due process claim. The Illinois Supreme Court found that the "*Brady* analysis is ill-suited for situations where evidence has been lost or destroyed and its contents are unknown." *See* p. A30, *infra*. As a factual matter, the court's finding is incorrect in that the State admittedly knew that Petitioner's fingerprints were not on the gas can in arguing that he "chose" not to leave fingerprints on the can. The only unknown is whether fingerprints from one or more other persons were on the can. Further, Petitioner met all three of the requirements set forth in *Brady*.

In order to allege a due process violation under *Brady,* a defendant must show that the suppressed evidence exists, that the evidence was material, and that the evidence was favorable to the defendant. First, the existence of the suppressed fingerprint evidence was demonstrated by the testimony elicited during the State's own direct examination of a police officer. Assistant State's Attorney Tsukuno asked the following question of Detective Paladino:

> Q: Okay. In fact the can had been sent to the Crime Lab for fingerprints, is that right?
>
> A: Yes.

(R. 1525). On cross examination by defense counsel, Detective Paladino affirmed his previous testimony that the can had been dusted for fingerprints, and that the black markings which were clearly visible on the can at trial were not on the can when he allegedly recovered it from under a sink in Apartment 206 of the burned building. Notably, the State did not object to the cross-examination or attempt to clarify Detective Paladino's testimony in any way. More compelling proof of the existence of the fingerprint evidence can hardly be imagined.

Second, the fingerprint evidence was surely material, since the presence of Petitioner's fingerprints on the gasoline can would have supported the State's case and, conversely, the absence of Petitioner's fingerprints or the presence of another person's prints on the can would have rebutted the State's accusation that Petitioner ever handled the can. Further, Petitioner was clearly prejudiced by the State's concealment because the physical condition of the can was also crucial to Petitioner's defense. The fact that the black marks on the can were from fingerprint powder, not soot, is inconsistent with the details of Petitioner's purported confession, heavily relied upon by the State, stating that the can was thrown into the second floor hallway, which was heavily damaged by fire. Petitioner's expert witness, John Campbell, would have testified that the can recovered from the scene could not have been in the second floor hallway because it did not demonstrate sufficient damage from the fire. Thus, the fingerprint evidence would have affected the jury's evaluation of the circumstantial evidence used to support Petitioner's conviction, and would have gone directly to the issue of reasonable doubt.

Finally, the Illinois Supreme Court ignored its own precedent in *People v. Nichols,* 63 Ill. 2d 443 (1976), where the court held that because the defendants denied the crimes and sought to demonstrate that other persons had committed the crimes, evidence suppressed by the State "must be considered as evidence favorable to the defendants." 63 Ill.2d at 448. Accordingly, the suppressed fingerprint evidence must be deemed favorable to Petitioner under state law. The State's concealment of the fingerprint evidence further demonstrates its exculpatory nature, since if Petitioner's prints were found on the can, this would have been the focus of the State's case. In addition, the State utilized the lack of fingerprint evidence to buttress its closing argument at sentencing, arguing that Petitioner "chose not to leave his fingerprints anywhere on that can." The State's argument based on evidence which it had earlier declared nonexistent is clearly improper, *see People v. King,* 248 Ill. App. 3d 180, 186 (1st Dist. 1993), and the argument itself reveals that the prosecution knew that Petitioner's fingerprints were not on the gas can, a fact that is clearly favorable to Petitioner.

In a case strikingly similar to the instant case, *People v. Flowers,* 51 Ill. 2d 25 (1972), the Illinois Supreme Court reversed and remanded for a new trial based on the State's nondisclosure of evidence. The State argued, as it did here, that the evidence showed only that tests were requested and that "there was nothing in the record to establish that 'results' were ever obtained or that such results were in existence and capable of being discovered." *Id.* at 28-29. The Illinois Supreme Court strongly condemned the State's argument, and wrote:

> That is hardly a satisfactory answer. The prosecution could have, and should have, candidly stated whether or not results had been obtained, and if obtained, what they disclosed. The circumstances of this case compel an inference that tests had been made and results obtained which were not disclosed.

Id. at 29. *See also People v. Nichols,* 63 Ill. 2d 443 (1976) (remanded for new trial where State suppressed evidence found at scene of crime and defendants denied the crimes charged); *People v. Wisniewski,* 8 Ill. App. 3d 768 (5th Dist. 1972) (reversed and remanded for new trial where State failed to produce evidence found at the scene which supported defendant's self-defense theory). The Illinois Supreme Court surprisingly failed to address its own precedent in *Flowers*.

The Illinois Supreme Court has made clear that "intentional tactic[s] to prevent disclosure of relevant material to the defendant" will not be condoned. *People v. Szabo,* 94 Ill. 2d 327, 348 (1983), *cert. denied,* 479 U.S. 1101 (1992). The decision below sets a highly dangerous precedent by refusing to apply *Brady* to the State's intentional nondisclosure of fingerprint tests performed on crucial evidence. In *United States v. Bryant,* 439 F.2d 642 (D.C. Cir. 1971), this danger was recognized:

> If the due process requirement is directed to evidence whose non-disclosure 'might' have harmed the accused, its purpose clearly reaches the type of missing evidence here. Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty

> would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal.

Id. at 648. Accordingly, the Illinois Supreme Court erred in refusing to apply *Brady* to Petitioner's due process claim.

The Illinois Supreme Court further erred in applying *Arizona v. Youngblood,* 488 U.S. 51 (1988), since a careful analysis of the facts demonstrates that *Youngblood*, not *Brady,* is distinguishable from the instant case. Unlike Petitioner, the defendant in *Youngblood* was not prejudiced by the State's failure to preserve evidence because the defendant was provided with access to the evidence, none of the evidence was used against the defendant, and the trial court took pains to correct any prejudice the defendant may have suffered by instructing the jury that "if they found that the State had destroyed or lost evidence, they might 'infer that the true fact is against the State's interest.'" *Youngblood,* 488 U.S. at 54.

In stark contrast, Petitioner was not even informed that the gasoline can had been dusted for fingerprints until the State revealed this fact in passing at trial during its direct examination of Detective Paladino. Petitioner was not permitted to examine the fingerprint evidence, since the State had already lost or destroyed it. Yet, during argument, and while disputing the very existence of the fingerprint evidence, the State proceeded to call to the jury's attention the lack of fingerprints on the can as evidence that Petitioner planned and then attempted to conceal the crime. Finally, the jury was not instructed that it could draw an adverse inference against the State if it

found that the State had destroyed or lost the fingerprint evidence. Indeed, the trial court below made no effort to correct any prejudice that destroying or losing the evidence may have caused Petitioner.

Further, the "bad faith" standard in *Youngblood* arose in a context of law enforcement officials failing to take affirmative steps to preserve evidence for later testing, and was not a case in which the police destroyed or lost, and then attempted to conceal, evidence of the testing itself. In *Youngblood,* the police failed to refrigerate clothing which contained semen samples that could have been later subjected to tests. The natural deterioration of the organic matter eliminated this possibility. In the present case, however, active conduct by the police necessarily caused the destruction or loss of documentary evidence of tests already performed. While this Court in *Youngblood* may have been justifiably reluctant to impose a duty upon the police to refrigerate clothing in order to permit possible testing later, no such rationale extends to requiring police to maintain records of testing performed on evidence which is solely in police custody.

To the contrary, it is a minimal, even negligible, burden to require police to maintain records of fingerprint testing or evidence found at a crime scene. Indeed, such record keeping is a standard, routine procedure, and even ordinary care, let alone good police work, should be sufficient to preserve such records. Moreover, the records of fingerprint evidence in this case were not simply "material that might be of conceivable evidentiary significance," as in *Youngblood,* but related to the key piece of circumstantial evidence, the importance of which had to be known to the police. Both the facts and the

rationale of *Youngblood* are therefore distinguishable from the present case.

The Illinois Supreme Court's decision to apply *Youngblood,* not *Brady,* to the present case may reflect a difficulty in neatly fitting the facts of this case under either decision and may indicate the need for a rule specifically covering lost or destroyed evidence of test results. In this case the Illinois Supreme Court found that *Brady* was "ill-suited for situations where evidence has been lost or destroyed and its contents are unknown." While Petitioner here asserts that the contents of the test results were in fact known to the State, as discussed above, the Illinois Supreme Court's general assessment of *Brady* may be correct. Where evidence of test results is destroyed or lost by the police, however, it seems clearly unfair to require a defendant to prove "bad faith" on the part of the police, as *Youngblood* requires. Because police cannot be depended upon to admit that they deliberately destroyed evidence, such a standard imposes upon defendants the extremely difficult burden of proving improper intent on the part of the police.

In the present case, the Illinois Supreme Court's ruling, by applying *Youngblood,* gives the State a license to conceal evidence and then argue that such concealment does not rise to the level of a constitutional violation because the nature of the evidence is unknown. With no threat of sanction and no means for an accused to prove the existence and nature of suppressed evidence, there is absolutely no incentive for the State to fully disclose evidence. In Petitioner's case, the record establishes that the fingerprint analysis did indeed exist and that it was favorable to Petitioner. The lower court's rulings,

however, have allowed the State to get away with concealing the existence of this evidence and then disclaiming it in the face of a motion for mistrial, making a mockery of the disclosure requirement at the heart of *Brady* and due process itself.

At a minimum, a rule should be crafted so that the defendant is not prejudiced when the State destroys or loses evidence of testing on clearly significant evidence, particularly when the evidence being tested and the test results themselves are solely in police custody. Simply requiring pretrial disclosure that such testing was conducted and the results destroyed or lost and an instruction that the results are to be presumed in favor of the defendant may suffice. Clearly, however, the rulings below in the present case failed to protect Petitioner's due process rights and afford him a fair trial.

Finally, even if this Court finds *Youngblood* applicable, the record plainly demonstrates that the State acted in bad faith. Significantly, the *Youngblood* court concluded that there was no bad faith on the part of the police after noting the following:

> [t]he failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence ... was made available to respondent's expert who declined to perform any tests on the samples.

Youngblood, 488 U.S. at 59. This conclusion indicates that this Court would have found bad faith to exist if the police

conduct was more serious than negligence, if information concerning the police's behavior was concealed at trial and if the opposing party's expert was denied access to the evidence.

In contrast with *Youngblood,* information about the conduct of the police was concealed at trial in the present case. Indeed, the record demonstrates that the State went far beyond simply losing potentially useful evidence. There is no question that for the most of the trial the defense was left to presume that the black powder covering the gasoline can on display was soot and not fingerprint powder, as Detective Paladino's testimony eventually revealed. Until this late point in the trial, the State concealed the fact that it had sent the can to the Crime Lab for fingerprint analysis, despite Petitioner's discovery requests. The prejudicial effect of this strategy is undeniable. When confronted with defense counsel's motion for a mistrial, the State then brazenly denied the existence of any fingerprint report. To allow the State to attempt to discredit its direct examination and the responsive testimony of its own witness by merely denying that any such testing was performed or that a report existed defies credulity. Here, as in *Flowers,* the importance of the gasoline can to the State's case and Petitioner's defense "compel[s] an inference that tests had been made and results obtained which were not disclosed." *Flowers,* 51 Ill. 2d at 29.

Further, the unusual situation of failing to refrigerate clothing addressed in *Youngblood* is more easily classified as negligence than is the failure to keep track of the official records generated by routine fingerprint testing of material evidence. "[T]he only way to protect *Brady*

material before the defendant requests it is to require the government to safeguard potentially exculpatory evidence." *See United States v. Bakhtiar,* 994 F.2d 970, 975 (2nd Cir.), *cert. denied,* 114 S.Ct. 554 (1993)(citing *United States v. Bryant,* 439 F.2d 642, 650-53 (D.C. Cir. 1971)). Failure to follow a reliable method of preserving evidence is, therefore, highly indicative of bad faith.

The gravity of the police's inaction in the present case is also magnified because, unlike *Youngblood* in which other samples were preserved, no comparable evidence existed. In addition to the commonplace nature of such testing, the gas can was obviously a key piece of evidence in the case used by the State to link Petitioner to the crime. The test results were therefore as important to the State as they were to Petitioner, and any police officer should have recognized the tremendous evidentiary significance of the test results and taken adequate care to ensure that the records of the results were maintained. Failure to take such minimal care, particularly in light of the significance of the evidence, is also highly indicative of bad faith.

Finally, the evidence in question in the case at hand was never made available to the defense. Indeed, in *Youngblood,* the defense's experts not only had access to the evidence in question, but they declined to perform any tests on the samples. While there may be no bad faith when police offer to let the defense examine evidence and the defense's experts decline, the situation in the case at hand was wholly different. In this case, not only was the defense denied access to the test results, but for most of the case, the State denied the defense access to the fact that the can had been submitted to testing. Even if it is true that the State had no results to share with the defense, it was

bad faith not to make an effort to secure the evidence and make it available to the defense or at least to explain the situation to the defense in a timely manner. Because Petitioner has demonstrated that the State acted in bad faith, and that the suppression of the fingerprint evidence prejudiced his ability to rebut the other evidence against him, this Court must reverse Petitioner's conviction and remand for a new trial even under *Youngblood*.

This Court should remand this case for a new trial to allow the jury to evaluate the absence of fingerprint evidence and the expert testimony of John Campbell regarding the physical condition of the can. While Petitioner cannot recover the fingerprint evidence which the State has lost or destroyed, he can utilize the inference arising from the State's failure to present or even preserve the fingerprint testing and the physical condition of the can to support his defense. It is the sole province of the jury to evaluate whether this evidence undermines the reliability of the other evidence used to support Petitioner's conviction. Therefore, this Court should reverse and remand this case for a new trial.

CONCLUSION

For these reasons, Petitioner respectfully requests that his petition for a writ of *certiorari* be granted.

Respectfully submitted,

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APPENDICES

Docket No. 71184-Agenda 3-May 1993
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
v. MADISON HOBLEY,
Appellant.

JUSTICE MILLER delivered the opinion of the court:

On February 18, 1987, Madison Hobley was charged by indictment in Cook County with murder (Ill.Rev.Stat. 1985, ch. 38, pars. 9-1(a)(1), 9(a)(2)), felony murder (Ill.Rev.Stat. 1985, ch. 38, par. 9-1(a)(3)), arson (Ill.Rev.Stat. 1985, ch. 38, par. 20-1(a)), and aggravated arson (Ill.Rev.Stat. 1985, ch. 38, pars. 20-1.1(a)(1), (a)(2)). These charges related to a January 6, 1987, fire that left seven persons dead, injured several others, and badly damaged a three-story apartment building at 1121-23 East 82nd Street in Chicago. Defendant entered a plea of not guilty to all counts. The jury returned verdicts of guilty against defendant on seven counts of felony murder, one count of arson and seven counts of aggravated arson.

The death penalty phase of defendant's trial was bifurcated. At the first stage, the jury found defendant eligible for the death penalty. At the second stage, the jury found no mitigating factors sufficient to preclude imposition of the death penalty. The trial court sentenced defendant to death. Defendant filed motions for a new trial and sentencing hearing, and the trial court denied these motions. Defendant's death sentence has been stayed pending direct review by this court (Ill.Const. 1970, art. VI, §4(b); 134 Ill. 2d R. 603; Ill.Rev.Stat. 1985, ch. 38, par 9-1(i)).

STATEMENT OF FACTS

On January 6, 1987, at approximately 2 a.m., a fire broke out in an apartment building located at 1121-23 East 82nd Street in Chicago. The fire claimed the lives of seven persons: Anita and Philip Hobley (defendant's wife and son), Anthony Bradford, Johnny Dodd, Shelone Holton, Schalise Lindey and Robert Stephens. The cause of death for each victim was determined to be acute carbon monoxide toxicity. Numerous others were burned while escaping from the fire, or severely injured when they leapt from windows.

The three-story apartment building had hallways which ran the length of the building on each floor, and there was a staircase at each end of the building. The south stairwell collapsed during the fire. Analysis of the stairwell debris revealed traces of gasoline. Fire investigators determined that the fire was started in the south stairwell.

At the time of the fire, defendant lived in apartment 301 with his wife and 15-month-old son. Apartment 301 was located directly across from the south stairwell on the third floor of the apartment building. There was conflicting testimony as to whether gasoline was poured on the door of apartment 301. The door and door jam of apartment 301 were almost completely burned away, but tests of the area revealed no traces of gasoline. The State's expert testified that a peculiar burn pattern on the floor in front of the door showed gasoline had been poured there, but that the water used to extinguish the fire could have washed away all traces of gasoline. Defendant's expert testified that the burn pattern was caused by a "chimney effect" created when the fire moved up the south stairwell.

At trial, Andre Council testified that on the night of the fire he stopped at an Amoco station located at 83rd and Cottage Grove in Chicago. Council remained at the station to visit with the gas station attendant, Kenneth Stewart. While he was at the gas station, Council allegedly saw a man in a dark peacoat approach the station on foot carrying a gasoline container. The man purchased $1 worth of gasoline. Council stated that the lighting at the station was excellent, and he was standing within five feet of the man while the man pumped the gas. Council further stated that he paid particular attention to the man because while the man was filling his gas container, he spilled some gasoline on Council's car. Approximately 30 to 45 minutes after the man had left, Council saw fire trucks go past the Amoco station. The fire trucks were heading in the direction of Council's home, so he left the Amoco station.

Upon arriving home, Council noticed that the fire trucks had stopped at a building located approximately one block from where he lived. Council walked over to the fire scene, and he noticed the man who had purchased the gasoline standing near the building. While watching television the next day, Council saw a picture of defendant on the news identifying him as a suspect detained by police in connection with the fire investigation. Council recognized defendant as the man whom he had seen buy gasoline the night before, and telephoned the police to report the incident.

Kenneth Stewart, the Amoco station attendant, also testified for the State. He stated that a short man entered the station with a gas container and bought $1 worth of gasoline. Stewart stated that the lighting conditions were excellent, but that he only saw the man's face for three to four seconds. The day after the fire,

the police brought Stewart to view a lineup. Initially, Stewart was unable to identify defendant in the lineup. The police then asked Stewart if he could identify with any degree of certainty any person in the lineup. Once again, Stewart was not able to identify defendant. Finally, the police asked if any of the men in the lineup could have been the man who bought the gasoline. Stewart then identified defendant as "favoring" the man who purchased the gasoline, but stated he could not be 100% sure that it was the same man.

Defendant claims that on the night of the fire, he awoke to the smell of smoke. Defendant allegedly shook his wife awake and went to the front door of the apartment and out into the hallway. After he had walked 40 to 50 feet down the hallway, he turned around to discovery the hallway had filled with smoke and flames. Defendant claims that he bent low and exited through the door at the north side of the building.

Defendant testified that after exiting the burning apartment building, he used the phone at a neighbor's house to call his mother, Myra Hobley. Defendant requested that Ms. Hobley bring him some clothes. When Ms. Hobley arrived, she took defendant to her apartment. After arriving at his mother's house, defendant appeared to be extremely upset. At approximately 4 a.m., an ambulance was called so that defendant might obtain a sedative. The paramedics arrived and took defendant to the hospital. Defendant's sister, Robin Milan, accompanied defendant to the hospital. Once at the hospital, some test were run on defendant. Soot was found in his nostrils, and the doctor diagnosed defendant as suffering from smoke inhalation. The doctor proposed more tests be performed, but declined to give defendant a sedative. At this point,

Robin apparently became upset and removed defendant from the hospital. After defendant and Robin left the hospital, they returned to their mother's home.

Chicago police department Detective Robert Dwyer was assigned to investigate the fire. The morning after the fire, Dwyer and his partner, Detective James Lotito, went to the medical examiner's forensic institute to identify the victims of the fire. While at the morgue, Dwyer spoke with Myra (Penny) Hobley, defendant's other sister. Penny had gone to the morgue to identify Anita and Philip Hobley. Penny informed Dwyer that defendant was at his mother's home at 8006 South Rhodes.

At approximately 9 a.m. the same morning, Dwyer, Lotito and two other officers went to 8006 South Rhodes to interview defendant. After identifying themselves, Dwyer and Lotito were invited in. Approximately 15 family members had congregated in the apartment. Dwyer suggested to defendant that it might be easier if they spoke outside in Dwyer's vehicle. Defendant agreed.

While Dwyer, Lotito and defendant were seated in Dwyer's vehicle, Dwyer told defendant that the fire had been deliberately set through the use of a liquid accelerant. When asked if he knew who could have started the fire, defendant stated that he suspected a woman named Angela McDaniels. Apparently, McDaniels had a relationship with defendant, but that relationship had been strained since defendant returned to his wife. Dwyer and Lotito then asked defendant if he would come to Area Two Police Headquarters (Area 2) for further questioning. Defendant agreed to accompany the officers.

Once at Area 2, defendant claims that Dwyer placed him in an interview room, handcuffed him to a wall ring, and began to physically abuse and racially harass him. Defendant allegedly requested that he be allowed to contact an attorney, but Dwyer would not allow it. Defendant claims that after the interview with Dwyer, he was driven to police headquarters at 11th and State (headquarters). Once at headquarters, Sergeant Garrity allegedly handcuffed defendant to a chair and began asking him a series of questions. Defendant claims that when he denied involvement in setting the fire, Garrity began to kick him in the shins. After his interview with Garrity, defendant was allegedly escorted to another room by Dwyer, Lotito and Officer McWeeney. Defendant claims that the officers hit and kicked him, and put a plastic typewriter cover over his head. Defendant allegedly "blacked out," and when he awoke, Dwyer told him that he had interviewed McDaniels, and that defendant was in trouble. Defendant was then allowed to see an attorney, Steven Stern, who had been called by defendant's family. Defendant denied that he ever confessed to setting the fire in his apartment building. Dwyer, Lotito, McWeeney and Garrity's testimony was widely divergent from that of defendant. Dwyer testified that after they arrived at Area 2, he learned of evidence contradicting defendant's story. Lotito therefore advised defendant of his *Miranda* rights prior to his interview, and defendant stated he understood. During defendant's interview, he provided Dwyer with McDaniels' address and phone number, but did not confess to involvement in setting the fire. Dwyer then asked if defendant would be willing to be interviewed by an officer at headquarters.

While defendant went to headquarters, Dwyer and Lotito attempted to locate McDaniels. They interviewed McDaniels over her lunch hour, and she denied any involvement in setting the fire. She claimed that several days prior to the fire, defendant had expressed a desire to reconcile. Defendant allegedly proposed to McDaniels that she move in with his wife and son. McDaniels stated that she refused, and that she informed defendant he must choose between his wife and her.

When defendant arrived at headquarters, he was taken to see Sergeant Garrity. Defendant agreed to take a polygraph examination and signed a written waiver of his *Miranda* rights. After the test, Garrity informed defendant that he had reason to believe defendant had lied during the test. Defendant allegedly broke eye contact and slumped in his chair. Defendant then confessed to involvement in setting the fire. Garrity contacted Dwyer, who arrived and took defendant to an interview room. Once again, defendant was advised of his rights. Defendant purportedly repeated his confession.

During the second confession, defendant stated that he had thrown a gasoline can down the second-floor hallway after starting the fire. Dwyer sent Detective Paladino to look for the can, and Paladino found a gasoline can under the sink in apartment 206. The resident of that apartment denied ever having seen the gasoline can before.

After his confessions, Dwyer took defendant to a room where a lineup could be held. Kenneth Stewart, the gas station attendant, was present to participate in the lineup. Before the lineup occurred, defendant's attorney, Steven Stern, arrived and spoke with defendant. The police were told not to interview defendant any further.

The lineup then proceeded, with Stern present, and Stewart tentatively identified defendant.

Defendant was returned to Area 2 for booking and processing after the lineup. Defendant was handcuffed in an interview room at Area 2, and Dwyer noticed that he was pulling and wrenching on his handcuffs. This testimony was corroborated by Jane Loeb, an assistant State's Attorney of Cook County who spoke with defendant later that evening. Dwyer denied ever physically brutalizing or intimidating defendant. Garrity, Lotito and McWeeny also denied abusing defendant. The next day, photographs were taken of defendant. His wrist was scraped, and he had one small bruise in the middle of his chest.

At the close of all evidence, the jury found defendant guilty of murder, arson and aggravated arson. The capital sentencing hearing was bifurcated. At the first stage, the jury found defendant eligible for the death penalty.

In aggravation, the State called two witnesses. The first witness was Patricia Phiefer. In late November 1986, Patricia received a call from Anita Hobley asking her to come over to Anita's apartment because defendant had "abducted" Philip. Patricia took Anita home with her that night. The next morning, defendant called Patricia's apartment demanding to speak to his wife, but Anita refused. That afternoon, a brick was thrown through the window of Patricia's apartment, and she called the police. After the police had arrived, the telephone rang. One of the policemen then present picked up a second telephone and listened while Patricia spoke with the caller. Patricia testified that she recognized the voice of the caller as defendant's. The caller asked if Patricia now would let him speak to his

wife, and she refused. She then thanked the caller for breaking her window, and he said that she was welcome. The caller then told Patricia that he was going to burn down the apartment in which she lived. The second witness in aggravation was Officer Glenn Evans, the officer who listened in on Patricia's phone call. He corroborated Patricia's story.

Defendant called 27 witnesses in mitigation. Defendant's mother and sisters testified that his father had been an alcoholic, and that his parents had divorced when defendant was very young. Defendant acted as man of the house and helped to support the family financially. Other family members testified that defendant often helped out with chores and odd jobs, and that although he would occasionally take some money for his help, he never asked. Defendant was described as very kind and respectful by his family members.

Several teachers and coaches also testified in mitigation for defendant. His teachers stated that he was a good student who never caused problems in class, and his coaches testified that he was an excellent athlete who acted as a team player.

Employees at the Cook County jail testified that although approximately 85% to 90% of the inmates had some gang affiliation, defendant did not. Defendant was described as a respectful person who did not give the guards any trouble, and it was noted that defendant regularly attended Bible study classes.

A Presbyterian pastor and a Sister also testified that defendant believed in God. They stated that they believed defendant's religious beliefs to be genuine, and not an affectation to try and avoid the death penalty.

Finally, former co-workers of defendant testified that he was a good worker. Defendant worked for a

medical supplies company, and would deliver and set up various medical apparatus in the homes of the elderly. He was described as quiet, and those who worked with him stated that he seemed to enjoy helping people. It was also reported that some of the elderly people for whom defendant had set up medical apparatus asked about him and extended their prayers to him.

The jurors returned a verdict of death after concluding that there were "no mitigating factors sufficient to preclude the imposition of a death sentence." Defendant claims numerous errors in pretrial proceedings and at the guilt and sentencing phases of the trial as grounds for reversal in this court.

DISCUSSION

I. Pretrial Motions

A. *Motion to Quash Arrest*

Prior to trial, defendant moved to quash his arrest and to suppress the "direct and indirect products" of that arrest. The trial court denied these motions.

Defendant claims that the trial court erred in determining when he was arrested. The trial court found that defendant was not arrested until after he confessed. Defendant claims that he was arrested before his alleged confession, and that at the point of his actual arrest, the police did not have probable cause to arrest him. "An individual has not been arrested unless the circumstances are such that a reasonable man would conclude that he was not free to leave." *People v. Eddmonds* (1984), 101 Ill. 2d 44, 61.

The day following the fire, Detectives Robert Dwyer and James Lotito arrived at Ms. Hobley's apartment to question defendant. Rather than questioning defendant in the apartment, Dwyer suggested that defendant accompany him to a police vehicle because

Ms. Hobley's apartment was crowded. Defendant admits that he consented to go out to Dwyer's car. Once in the car, defendant stated that he suspected his former girlfriend, Angela McDaniels, had started the fire. Understandably, Dwyer wished to speak with defendant further on this subject. Dwyer, however, did not wish to interview defendant at length in his car because a television news van had been following him around all morning. Dwyer, therefore, asked defendant if he would come to the police station (Area 2) for further questioning.

When defendant arrived at Area 2, Dwyer learned some information about the fire that was inconsistent with defendant's story. It was for that reason that prior to interviewing defendant, Lotito read defendant his *Miranda* rights. The interview terminated with defendant's turning over McDaniels' phone number.

Dwyer testified that after the interview, he suspected defendant was "holding something back." Dwyer thought that because defendant had been involved with McDaniels, he might be trying to protect her. Dwyer therefore asked if defendant would go to the police station at 11th and State (headquarters) to take a polygraph examination. Defendant consented, and he was transported to headquarters. Once at headquarters, defendant signed a written waiver of his *Miranda* rights and was administered a polygraph examination. At the conclusion of the polygraph examination, the examiner, Sergeant Garrity, informed defendant that he had reason to believe defendant was lying. Defendant then confessed to starting the fire.

The trial judge found that defendant was not under arrest until after his confession to Garrity. We agree. Until he had confessed, defendant's status with

the police was that of any interested citizen attempting to help in the investigation. Defendant was not handcuffed prior to his confession, nor was he taken any place without his consent. We believe that prior to his confession, a reasonable person in defendant's position would have believed that he was free to leave.

Defendant's confession after the polygraph examination supplied the police with probable cause to arrest defendant. As discussed above, defendant was not arrest until after he had confessed. Accordingly, we reject defendant's contention that the police lacked probable cause to arrest defendant at the time of his arrest.

Defendant further contends that in determining when he was placed under arrest, the trial judge employed an improper test, *i.e.*, whether or not the defendant was "prevented from leaving." As stated earlier, the correct analysis to be used in determining when an arrest took place is whether a reasonable person in the defendant's situation would have considered himself free to leave. (*Edmonds*, 101 Ill. 2d at 61; *People v. Reynolds* (1983), 94 Ill. 2d 160, 165.) Defendant points to the following statements by the trial judge:

> "THE COURT: [T]he Court fails to see where the defendant's liberties and choice of leaving were prevented.
>
> Counsel for the defense says that the defendant was prevented from leaving the station. I

do not recall any testimony to that effect.

In fact, when the defendant was taken to the station, it was because he was aiding the police in developing possible suspects. ***He certainly was not under arrest at that time.

Then there was a second conversation. He did not appear to be under arrest at that time. There is no indication that he was prevented from leaving.

Counsel for the defense said he was prevented from seeing his family, prevented from making phone calls, et cetera. I do not recall any testimony to that effect.

***

It is the Court's opinion that the defendant was not under arrest prior to this until the entire story was developed, and under the totality of the circumstances, I certainly feel that the defendant's motion will be denied."

During arguments on the motion to suppress, defendant contended that he was prevented from leaving, making phone calls and seeing his family. In his response to defendant's argument, the trial judge was merely answering defendant's contentions. The trial judge found that under the totality of the circumstances, the defendant was not placed under arrest until after he had made a confession. there has been no showing that the trial judge applied an incorrect analysis in making that determination.

B. *Motion to Suppress Statements*

Defendant claims that his confession was tainted by an illegal arrest. Because we have found that defendant's arrest was not illegal, we need not consider whether defendant's confession was sufficiently removed from the taint of an illegal arrest. Defendant further claims that he did not knowingly and voluntarily waive his constitutional rights prior to his alleged confession. Defendant sets forth two bases for this claim.

First, defendant claims that he misunderstood the effect of signing the written waiver form prior to his polygraph examination. Defendant claims he thought the form only pertained to the polygraph examination.

Before defendant signed the written waiver, Sergeant Garrity read each right contained therein and asked if defendant understood that right. Defendant indicated that he understood each right. The *Miranda* warnings given by Garrity were sufficient to apprise defendant of his constitutional rights. We reject defendant's argument that any "misunderstanding" involved with signing the written form limited the effectiveness of the *Miranda* warnings given to defendant prior to his polygraph examination.

In addition to the *Miranda* warnings given to defendant prior to his polygraph examination, defendant was given *Miranda* warnings during his first interview at Area 2. Once an accused is advised of the *Miranda* warnings and acknowledges his understanding of them, the voluntariness of subsequent statements is not compromised by failure to repeat the warnings at each successive interview. (*People v. Hill* (1968), 39 Ill. 2d 125, 131-32.) Defendant was given *Miranda* warnings twice prior to his confession to Garrity. Each time defendant was given his *Miranda* warnings, he indicated that he understood them. Clearly, the police's conduct was sufficient to apprise defendant of his constitutional rights. We find, therefore, that the trial court did not err in finding that defendant's waiver of his *Miranda* rights was voluntary.

Defendant next claims that his alleged confessions were involuntary because they were procured through physical and verbal abuse. The day after his confession, photographs were taken of defendant showing scrapes on his wrists and a small bruise in the middle of his chest. Defendant claims these injuries were caused by the police's use of physical abuse during defendant's interrogation.

"[W]hen it is evident that a defendant has been injured while in police custody, the State must show, by clear and convincing evidence, that the injuries were not inflicted as a means of producing the confession." (*People v. Wilson* (1987), 116 Ill. 2d 29, 40.) Detective Dwyer testified that he observed defendant tugging at his handcuffs while defendant was waiting to speak with an assistant State's Attorney. This testimony was corroborated by the assistant State's Attorney. This testimony was corroborated by the assistant State's

Attorney. We believe the State has show by clear and convincing evidence that the injuries to defendant's wrists were self-inflicted.

It is not known how defendant's chest was bruised. The defendant, however, has not shown that this injury occurred while he was in police custody. In *Wilson*, there was testimony by the police that defendant did not have any significant injuries at the time of his arrest. There was also medical testimony that Wilson's injuries had occurred after his arrest. In the present case, there was no testimony or medical evidence that defendant did not have the bruise on his chest prior to his arrest. Because there was no evidence showing that defendant's chest bruise occurred while he was in custody, the burden did not shift to the State to "show, by clear and convincing evidence, that the injuries were not inflicted as a means of producing the confession."

It is the function of the judge at the suppression hearing to determine the credibility of the witnesses and to resolve conflicts in their testimony. (*People v. Redd* (1990), 135 Ill. 2d 252, 289.) While defendant claims to have been beaten and kicked numerous times during his interrogation by the police, the only injuries present on the defendant the next day were a small bruise in the middle of his chest and "scrapes" around his wrists. There was testimony that the injury to defendant's wrist was self-inflected, and all the police officers involved in the alleged brutality denied any abuse took place. Further, defendant's injuries were not commensurate with his alleged beatings. We do not believe the trial judge abused his discretion in denying defendant's motion to suppress statements.

II. Impaneling the Jury

A. *Challenges for Cause*

Defendant claims that the trial court made disparate rulings on challenges for cause made by the State and the defense. Defendant alleges that these rulings caused defendant to use 2 of its 14 peremptory challenges. Defendant eventually used all of his peremptory challenges, and his motion for additional peremptory challenges was denied.

The defendant first points to the *voir dire* of Gail Porter, whom the court dismissed for cause on a motion by the State. Before being dismissed, Porter stated that she might believe the testimony of policemen or firemen "a little bit more" than the testimony of other witnesses. Porter also stated that she did not know if she could sign a guilty verdict because she did not think it was her responsibility to "judge someone's fate."

Defendant next claims that the trial court denied his challenges for cause to June Deacan and Susan Wisniewski although they made comments similar to Porter's. June Deacan stated during *voir dire* that she might be influenced if a witness was a policeman. Deacan explained that she was brought up to believe the police. When asked if she would believe a police officer's testimony more or less than the testimony of any other person, Deacan stated that she would try to treat policemen like any other witness. When the trial court denied his challenge for cause, defendant used a peremptory challenge to excuse Deacon. Susan Wisnewski stated that she "guessed" she could treat a police officer the same as any other witness, but she explained that she had a family vacation planned in approximately two weeks. Defendant claimed that a conflict between Wisnewski's vacation and the trial could

impair her partiality, but this reasoning was rejected by the court. Defendant then sought to excuse Wisnewski for cause based on her response that she "guessed" she could treat police officers like other witnesses. The trial court denied defendant's challenge for cause and defendant exercised a peremptory challenge.

In addition to saying that she might accord the testimony of police officers more weight than the testimony of other witnesses, Gail Porter stated that because she did not think it was her responsibility to judge another's fate, she did not know if she could sign a guilty verdict form. Neither of these comments were tempered or recanted by later statements. Porter's expressed reservation concerning her ability to judge another person by signing a guilty verdict made her removal for cause proper. June Deacan stated that she would try to follow applicable law, and Susan Wisnewski stated that she guessed she could follow applicable law. Unlike Porter, neither Deacon nor Wisnewski expressed reservation concerning their ability to follow the law, and we do not believe it was error for the trial judge to deny motions to dismiss these jurors for cause.

An equivocal response by a prospective juror does not necessitate striking the prospective juror for cause where the prospective juror later states that he will try to disregard his bias. (See *People v. Tipson* (1991), 222 Ill. App. 3d 657, 664 (prospective juror stating she would try to disregard her bias was not struck for cause).) Neither does a scheduling conflict preclude a prospective juror from service where the juror's comments do not indicate that the conflict will cause bias. *See People v. McGhee* (1992), 238 Ill. App. 3d 864 (time constraints of prospective juror did not necessitate his removal for cause).

B. Defendant's Motion for Additional Peremptory Challenges

After defendant had exhausted all his peremptory challenges, he moved for additional peremptory challenges. The trial judge denied this motion. Defendant contends that this denial was an abuse of discretion.

Reasonable limits on the right of peremptory challenge, including a maximum number of peremptory challenges, are necessary if the judicial process is to function effectively. (*People v. Moss* (1985), 108 Ill. 2d 270.) Supreme Court Rule 434(d) (134 Ill. 2d R. 434(d)) establishes the number of peremptory challenges that the parties may normally use in criminal cases. Rule 434(d) does not grant the trial judge discretion to allow additional peremptory challenges.

The trial judge noted that both sides had taken care in the use of their peremptory challenges. He determined that there was no viable reason for allowing additional peremptory challenges. Nothing in the record suggests that defendant required additional peremptory challenges to assure an impartial jury. Because we believe that additional peremptory challenges were not necessary, we need not consider here whether trial judges have discretion to grant peremptory challenges in addition to those provided by rule.

C. *Additional Voir Dire of Prospective Juror Noel*

Defendant contends that it was an abuse of discretion to reopen the *voir dire* examination of prospective juror Frenchie Lamar Noel. After the examination of several prospective jurors, including Noel, in open court, the court and counsel adjourned to chambers to discuss challenges for cause and peremptory challenges. The State moved to dismiss Noel for cause

based on two separate grounds. First, the State noted that Noel indicated that he had been "jumped by police" and wrongfully charged with a crime. Although the charges were eventually dropped, Noel stated that he believed the court system had been unfair to him. Next, the State claimed that during his initial *voir dire* examination, Noel had been equivocal in his responses to *Witherspoon* questions.

During the in-chambers conference, the trial judge noted that he had omitted the question of whether Noel would accept the testimony of police officers the same as any other witness. The trial judge explained that he omitted this question because, based on Noel's claim of prior police misconduct, he was afraid Noel's answer would taint the rest of the venire.

In response to the State's motion and based on his explanation for the omitted questions, the trial judge asked that Noel be brought into chambers for further questioning. On his further examination, Noel was asked to explain in detail his prior incident with the police. After doing so, Noel stated that he would treat the testimony of police officer witnesses the same as the testimony of any other witness. Noel was further asked to clarify his position regarding the death penalty. After several answers that the trial judge characterized as "evasive," Noel stated that he would not consider the death penalty under any circumstances. The trial judge then struck Noel for cause. The defense argues that the trial judge erred in further examining Noel in chambers after the initial *voir dire* in open court.

There was evidence in the present case that Noel may have been prejudiced. Noel's repeated references to being "jumped" by police officers was evidence that Noel did not trust police officers, and he might treat them

differently than other witnesses. Additionally, Noel's equivocal responses to the *Witherspoon* questioning made his impartiality respecting the death penalty suspect.

Noel had not yet been sworn, nor had the attorneys accepted him as a juror. The trial judge admittedly did not subject Noel to the full range of *voir dire* questioning because he was afraid that Noel's answers would taint the rest of the venire. Noel's *voir dire* had not yet been completed, and the initial portion of his *voir dire* raised serious questions as to his ability to properly perform the duties of a juror. Under these circumstances, it was not error to ask additional questions of Noel in chambers out of the hearing of the rest of the venire.

D. *Voir Dire and Service of Juror Matthew Evans*

Defendant claims that during *voir dire*, Matthew Evans did not fully divulge what could have been a bias in favor of the State. During trial, it came to defense counsel's attention that Evans was the friend of a judge, and that Evans' father-in-law had been an investigator for the Cook County State's Attorney. Defendant contends that Evans failed to disclose this information when asked. At the close of evidence, the defense moved to reopen the *voir dire* of Evans, to exclude Evans and for a mistrial. The trial court denied these motions.

Prior to trial, the trial judge spoke to the entire venire and asked the following questions:

> "THE COURT: Do any of you-this is a two part question. Do any of you know any Assistant State's Attorneys, Public Defenders or judges' Okay. Now, the second part of that question.

> The fact that you may know an Assistant State's Attorney, or Public Defender, or a judge, would this in any way prevent you from being fair and impartial?
>
> In other words, all we are asking you to do is listen to the evidence, and based on that evidence and the law, come up with a fair and impartial verdict. Would the fact that you may know one of these people, would that in any way affect your ability to do so?
>
> (No response.)
>
> THE COURT:
>
> Okay. No problem there."

Defendant contends that Evans failed to disclose that he was a friend of a judge in response to the above question. The record does not disclose which members of the venire, if any, indicated in response to the question that they knew an assistant State's Attorney, public defender or a judge. The defendant, therefore, has not established that Evans failed to answer the question in the affirmative.

In any event, Evans indicated during *voir dire* that he was a police officer in the Chicago suburb of Westchester. Evans candidly admitted knowing numerous policemen and attorneys. In response to the trial judge's inquiry into whether he knew any State's Attorneys, Evans indicated that he knew a former State's

Attorney, who was a judge at the time of trial, and a State's Attorney from the Fourth District. Evans stated that he did not believe there was any reason that he could not be impartial in this case.

Where neither party has exercised a peremptory challenge against a potential juror, the decision whether to accept the potential juror as an impartial trier of fact is discretionary with the trial judge. (*People v. Taylor* (1984), 101 Ill. 2d 377, 386-87.) In the present case, we do not believe that the additional information regarding Evans' association with a judge or his father-in-law's position with the Cook County State's Attorney put Evans' impartiality in question. There is no evidence in the record that Evans withheld any information that the trial court asked him to disclose. Evans freely admitted that he was acquainted with a State's Attorney and a judge. Defendant fails to explain how Evans' friendship with an additional judge could impair his impartiality or offer defendant further information with which to test the potential juror for bias. Further, due to Evans' friendship and strong ties to law enforcement, the occupation of his father-in-law does little to add to Evans' apparent knowledge of the criminal judicial system. Based on the similarities between the information disclosed by Evans and that discovered by defendant, it was not an abuse of discretion to deny defendant's motion to reopen the *voir dire* examination of Evans.

Defendant also claims that the State exploited Evans' background as a policeman to bring to the attention of the jury the fact that defendant was given a polygraph examination. Defendant contends that this alleged exploitation was in violation of an *in limine* order. No specific mention of defendant's polygraph

examination was made during trial. Defendant, however, claims that the testimony of Sergeant Patrick Garrity, the officer who administered the polygraph examination, was designed to let Evans know that defendant took a polygraph examination. Garrity testified that he worked int he police department's crime lab, and that defendant was brought to him for questioning. Garrity testified that prior to the interrogation, defendant signed a written waiver of his *Miranda* rights. Garrity stated that he then asked defendant about his background, how he was feeling, whether he was taking any medication, and whether he had consumed any alcohol. Defendant claims these questions had no relevance to the case, and could only be designed to inform Evans that Garrity gave defendant a polygraph examination. Defendant, however, failed to object to the testimony at trial, and has therefore waived the issue on appeal. *People v. Shum* (1987), 117 Ill. 2d 317, 340.

III. *Ineffective Assistance of Counsel*

Defendant claims that defense counsel provided ineffective assistance in several respects. First, defendant claims that counsel provided ineffective assistance by allowing Matthew Evans to sit on the jury. Next, defendant claims that defense counsel provided ineffective assistance by failing to file a motion to discharge the venire. Finally, defendant claims that counsel was ineffective for failing to secure the presence of a material witness.

In order to establish an ineffective-assistance-of-counsel claim, the defendant has the burden of showing (1) that "counsel's performance was deficient" in that it "fell below an objective standard of reasonableness," and (2) that the "deficient performance prejudiced the

defense" such that the defendant was deprived of a fair trial whose result was reliable. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064.

A. *Allowing Evans to Sit on the Jury*

During *voir dire*, defense counsel failed to challenge Matthew Evans, a police officer, for cause or to exercise a peremptory challenge against Evans. Defendant characterizes this decision as "incredible." Defendant alleges that Evans' status as a police officer could have created a bias in favor of the police witnesses who testified for the State. Evans, however, stated during *voir dire* that he could treat police witnesses the same as any other witnesses. Evans was also a suburban police officer. The officers who testified for the State served in Chicago. Defense counsel exercised a peremptory challenge against Lamar Minor, the only potential juror questioned who was a Chicago police officer, showing that defense counsel distinguished between the two prospective jurors. As a preliminary matter, defendant would have us adopt the position that the defense's acceptance of a police officer as a juror in any case, without more, constitutes ineffective assistance of counsel. We cannot accept this point.

Defendant also asserts that defense counsel should have peremptorily challenged Evans because Evans would be able to discern, based on the testimony of Garrity, that defendant took a polygraph examination. Defendant argues that it was the State's improper conduct which alerted Evans to the fact that defendant was given a polygraph examination. Ineffective assistance is judged at the time of the attorney's conduct. (*Strickland*, 466 U.S. at 690, 80 L. Ed. 2d at 695, 104 S. Ct. at 2066.) Defense counsel could not anticipate improper conduct

by the State. Even if we were to accept defendant's interpretation of the facts, therefore, defense counsel would not have been ineffective for failing to excuse Evans on this ground at the time the jury was chosen.

B. *Failure to File a Motion to Discharge the Venire*

Defendant contends that the pool of potential jurors contained a disproportionately low number of blacks. Of 114 venire persons, defendant alleges that only 16 were black. Defendant claims that trial counsel was ineffective for not filing a motion to discharge the venire on this ground.

> "Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel prior to the voir dire examination. For good cause shown the court may entertain the motion after voir dire has begun but such motion shall not be heard after a jury has been sworn to hear the cause." Ill. Rev. Stat. 1989, ch. 38, par. 114-3(a).

Defense counsel questioned the number of blacks in the venire at the time of trial, but not until after the jury had been selected and sworn. In response, the trial judge stated:

> "There weren't that many blacks on the venire but the State-the defense could have brought that up

> earlier. Maybe we would have worked something out."

Defendant contends that the disproportionately low number of blacks on the venire violated the fair-cross-section requirement as enunciated in *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692. Defendant asserts that if defense counsel had raised this issue within the time period prescribed by section 114-3, the trial judge would have ordered a new venire.

"[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." (*Taylor*, 419 U.S. at 527, 42 L. Ed. 2d at 696, 95 S. Ct. at 696). In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the under-representation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri* (1979), 439 U.S. 357, 364, 58 L. Ed. 2d 579, 586-87, 99 S. Ct. 664, 668.

Defendant has not established a violation of the fair-cross-section requirement. Defendant's allegations relate to the composition of an isolated venire of 114 potential jurors. The fair-cross-section requirement deals with the methods of selecting jurors from all eligible citizens. Defendant has not shown that the low number of blacks on the venire from which his jury was chosen resulted from anything other than pure chance. This is

insufficient to show a violation of the fair-cross-section requirement.

Defendant claims that even if the fair-cross-section requirement was not violated, the trial judge's comments show that defense counsel's failure to raise the issue prejudiced defendant. This claim is without merit. As discussed above, defendant has failed to show that the venire from which his jury was chosen was constitutionally deficient. An attorney's conduct does not fall below the range of "reasonable professional assistance" under *Strickland* (466 U.S. at 688-89, 80 L. Ed. 2d at 694, 104 S. Ct. at 2065-66) by failing to make an argument that has no legal basis.

C. *Failure to Secure the Presence of a Material Witness*

Defendant claims that trial counsel provided ineffective assistance by failing to secure the presence of Angela McDaniels as a witness on defendant's behalf. The decision whether to call particular witnesses is generally a matter of trial strategy. (*People v. Jones* (1993), 155 Ill. 2d 357, 369.) A decision which involves a matter of trial strategy will generally not support a claim of ineffective representation. *People v. Flores* (198[illegible], 128 Ill. 2d 66, 106.

During a motion to suppress, defense counsel learned that the police had interviewed McDaniels. McDaniels stated to police that she knew nothing about the origin of the fire, but that defendant had recently attempted to reconcile with her. Defendant proposed that McDaniels move in with defendant and his family. McDaniels refused and told defendant that he had to choose between her and his wife. This testimony from McDaniels would have been harmful to defendant's case. Defendant does not explain what positive effect, if any, McDaniels' testimony could have had. Under these

circumstances, it was not ineffective assistance of counsel to fail to procure McDaniels as a witness on defendant's behalf.

IV. Trial Errors

A. *Failure by State to Disclose Fingerprint Evidence*

Defendant contends that the State withheld evidence in violation of *Brady v. Maryland* (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, and our Rule 412 (134 Ill. 2d R. 412). Defendant requested the State to "supply any report and results of any and all scientific test, ***including such tests as ***fingerprints." The State did not provide defendant with any fingerprint reports.

At trial, Detective Paladino, a witness for the State testified that the gasoline can he found in apartment 206 was sent to the crime lab for fingerprint analysis. Additionally, Paladino testified that he believed the black powder visible on the can at trial was fingerprint powder. Based on Paladino's testimony, defendant moved for a mistrial. The prosecutor denied the existence of a fingerprint report, and opened his file to defendant. No fingerprint report was found, and the trial court denied defendant's motion for a mistrial.

In *Brady*, the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218, 83 S.Ct. at 1196-97.

In the present case, the contents of the fingerprint report, assuming a fingerprint report ever existed, are unknown. In order to determine materiality under *Brady*, it is necessary to consider the content of the

undisclosed evidence and its effect upon defendant's guilt or punishment. The *Brady* analysis is ill-suited for situations where evidence has been lost or destroyed and its contents are unknown. Additionally, the sanction normally imposed under *Brady*, a remand for a new trial, would be ineffective in this type of situation. The undisclosed evidence would not be available at a second trial. We do not believe, therefore, that *Brady* controls here.

The present case is similar to *Arizona v. Youngblood* (1988), 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289, 109 S.Ct. 333, 337, where the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." The underlying policy concerns of *Youngblood* are analogous to those in the present case. In order to promote the preservation of exculpatory evidence, there must be the possibility of a sanction where evidence is lost or destroyed. On the other hand, a defendant should not be rewarded for the inadvertent loss of a piece of evidence where other evidence sufficient to support his conviction remains. The proper balance between these competing interest can be accomplished through careful consideration of (1) the degree of negligence or bad faith by the State in losing the evidence, and (2) the importance of the lost evidence relative to the evidence presented against the defendant at trial.

We believe that imposing sanctions against the State here would be inappropriate. First, defendant has failed to show any bad faith on the part of the State. More importantly, there was independent evidence tying defendant to the gasoline can. Two witnesses identified defendant as filing a gasoline can prior to the fire, and a

can similar to that described by the witnesses was discovered as a result of information gained from defendant's confession. There is also overwhelming evidence of defendant's guilt separate from the gasoline can.

Defendant next claims that the State's withholding of the fingerprint report violated our Supreme Court Rule 412 (134 Ill.2d R. 413). Rule 412 deals with material or information that is within the possession or control of the State. As discussed above, it is not clear that a fingerprint report ever existed. However, even if we assume that a fingerprint report did exist at one time, it has now been lost. The prosecutor stated that he had never seen a fingerprint report. The State opened its entire file to defendant, and the fingerprint report was never found. Defendant has not shown that the fingerprint report was in the possession or control of the State, or available to it. The State, therefore, could not have an obligation to disclose the report under rule 412.

B. *Cross-Examination of Andre Council*

Defendant claims the trial court erred in not permitting defense counsel to question prosecution witness Andre Council in connection with an alleged arson arrest in March 1987. On cross-examination, defense counsel asked Council if it were true that he had been arrested for arson in March 1987. The State objected and a conference as held in chambers. A police report was produced that indicated Council had been questioned concerning an arson on March 17, 1987. Council was released the same day due to insufficient evidence, and he was never charged with the crime.

The latitude to be allowed on cross-examination and rebuttal is a matter within the sound discretion of the trial court, and a reviewing court should not interfere

unless there has been a clear abuse of discretion. (*People v. Thompkins* (1988), 121 Ill.2d 401, 441-42; *People v. Collins* (1985), 106 Ill.2d 237, 269; *People v. Peter* (1973), 55 Ill.2d 443, 451-52.) We do not believe the trial court abused its discretion here.

Defendant states that Council was present near the scene of the fire both before and after the fire. Defendant contends that the combination of Council's proximity to the scene of the fire and his having been questioned in a different arson investigation on some prior occasion somehow affects his credibility here. Defendant, however, does not explain how Council's credibility would be affected. We do not see how the facts put forth by defendant bring Council's credibility into question. We reject, therefore, defendant's contention.

C. *Opinion Testimony*

Defendant claims the trial court erred in allowing improper lay opinion testimony by Peter O'Sullivan and Thomas Sullivan, the paramedics who transported defendant to the hospital. When asked how defendant first appeared to him, Peter O'Sullivan testified that defendant appeared kind of strange, not like he was really "remorseful." O'Sullivan later testified that when a person has been a paramedic for some time, he begins to understand the way people react to certain situations. Thomas Sullivan testified that on the way to the hospital defendant discussed his job, but not his wife and child. Sullivan characterized this conduct as unusual.

Defense council failed to object to the testimony of Peter O'Sullivan during the trial. Any objection to that testimony, therefore, has been waived in this appeal. (*People v. Shum* (1987), 117 Ill.2d 317, 340; *People v. Collins* (1985), 106 Ill.2d 237, 263; *People v. Stewart*

(1984), 104 Ill.2d 463, 488.) Defendant contends that we should nevertheless consider this testimony under the plain error doctrine. The plain error doctrine provides that a court of review may notice waived errors if the evidence is closely balanced or the error is so fundamental and of such magnitude that the accused was denied a fair trial and remedying the error is necessary to preserve the integrity of the judicial process. (*People v. Henderson* (1990), 142 Ill.2d 258, 311.) There is overwhelming evidence in the present case against defendant, and we do not believe the error, if any, involved in admitting the opinion testimony of Peter O'Sullivan denied defendant a fair trial. Accordingly, we decline to review the testimony under the plain error doctrine.

Unlike the testimony of Peter O'Sullivan, defendant did object to the testimony of Thomas Sullivan. Sullivan testified that on the way to the hospital defendant discussed his job, but not his wife and child. Sullivan characterized this conduct as "unusual." Defense counsel's objection to this testimony was overruled by the trial court. Generally, a witness may only testify to facts within his own personal knowledge and recollection, and may not draw inferences and conclusion. *People v. Enis* (1990), 139 Ill.2d 264, 294-95.

The State failed to lay a proper foundation for Thomas Sullivan's testimony as to whether defendant's conduct was normal. Even if the State had laid a proper foundation, however, it was not necessary for the jury to hear Sullivan's opinion. Sullivan testified that his opinion was based upon defendant's topic of conversation in the back of the ambulance. The jury was familiar with the circumstances preceding defendant's ambulance

ride, and it was capable of determining whether defendant topic of conversation was unusual. It was improper, therefore, for the trial judge to overrule defendant's objection to Sullivan's opinion testimony. Given the overwhelming evidence against defendant and the relative insignificance of this portion of Sullivan's testimony, however, we believe the trial court's failure to sustain defendant's objection was harmless error.

D. *Evidence of Allegations of Prior Police Brutality*

Defendant testified that he was physically abused and racially harassed by Detective Dwyer and Lotito during his interrogations. Defendant wanted to introduce the testimony of other persons who had filed complaints with the office of professional standards against Dwyer. The State filed a motion *in limine* to exclude testimony regarding prior alleged abuse by Dwyer, and after a hearing, the trial court granted the motion.

Defendant requested that he be allowed to introduce evidence of three persons who were allegedly abused by Dwyer. At the resulting hearing on the State's motion *in limine*, Ms. Tomsek alleged that Dwyer pushed her and pressed his thumbs against her throat. Dwyer claimed that Tomsek was so intoxicated that she could not be interviewed and was placed in a room to "sleep it off." Mr. Lawson complained that police were belligerent, but made no claim of any physical abuse. Defendant also requested that Stanley Howard be allowed to testify. In 1984, Howard filed a complaint that Dwyer had beat him around the face and head, punched him six times, kicked him in the stomach, and beat him in the ribs and ankles.

In support of his argument that the trial court erred in excluding the testimony of Tomsek, Lawson and Howard, defendant cited *People v. Banks* (1989), 192 Ill.

App.3d 986. In *Banks*, the appellate court held that the trial court erred in excluding evidence of prior abuse by the officers who arrested Banks. A doctor testified that Banks sustained multiple bruises and scrapes as the result of trauma with a blunt instrument. Banks claimed that he had been beaten by the police with a flashlight. Banks sought to introduce evidence that 13 months prior to the incident, another person was allegedly beaten by the same officers in a similar manner and sustained comparable injuries.

In *Banks*, the court relied on three elements in admitting evidence regarding prior allegations of police brutality: (1) the prior allegations of police brutality were not unduly remote; (2) the prior allegations of police brutality were against the same office, and they were similar to the allegations put forth by the defendant; and (3) in both the prior allegations of abuse and the case before the court, there was evidence of injury consistent with police brutality. We believe the present case is distinguishable from *Banks*. The allegations of Tomsek and Lawson are dissimilar to the allegations of defendant, and therefore, those allegations are not relevant to the present case. The trial judge stated that Howard's allegations of police misconduct by Dwyer were similar to the defendant's allegations in the present case. The alleged abuse of Howard, however, took place approximately three years prior to defendant's arrest. Hence, the alleged abuse was much more remote than in *Banks*. Further, there was no evidence that either Howard or defendant sustained injuries consistent with their claims of police brutality. We do not believe, therefore, that the trial court erred by excluding Howard's allegations of prior abuse.

E. *Expert Opinion as to Location of Gasoline Can*

Defendant contends that the testimony of his expert witness, John Campbell, was unduly limited by the trial court. After Campbell had given his opinion on how the fire had started and progressed, defense counsel showed Campbell a photograph of the gasoline can found in apartment 206. Defense counsel then showed Campbell a photograph of the second-floor hallway as it appeared after the fire and asked if the gasoline can could have been located in the hallway during the fire. The State's objection to this question was sustained. During a sidebar, defense counsel made an offer of proof that Campbell would have testified that it was not possible that the gasoline can was located in the second-floor hallway during the fire.

Campbell's expert opinion was not necessary to facilitate the jury's understanding of the facts in this case. Defense counsel was allowed to establish through the testimony of Campbell that if the gasoline can was directly subjected to the fire, only part of the can would remain. The can was admitted into evidence, and the jury was given the opportunity to observe that it was not severely damaged. Photographs of the second-floor hallway were also admitted into evidence. We do not believe that the trial court abused its discretion in limiting Campbell's testimony.

F. *Guilt Beyond a Reasonable Doubt*

Defendant claims that he was not proven guilty beyond a reasonable doubt because the identification testimony of Council and Stewart, as well as his alleged confession, was unreliable. The test of whether a defendant has been proven guilty beyond a reasonable doubt is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S.Ct. 2781, 2789; *People v. Young* (1989), 128 Ill.2d 1, 49.

Defendant first claims that he was not proven guilty beyond a reasonable doubt because the eyewitness identification of defendant buying gasoline is unreliable. Defendant asserts that the testimony of a single eyewitness may be sufficient to sustain a conviction, but claims that the eyewitness' account must have several indicia of reliability to warrant such a result. (See *People v. Patrick* (1990), 205 Ill. App.3d 222, 226; *People v. Kidd* (1989), 180 Ill. App.3d 1065, 1070; *People v. Dean* (1987), 156 Ill. App.3d 344, 351.) We need not consider the indicia-of-reliability test here because the State presented more evidence than the testimony of a single eyewitness to procure defendant's conviction. In the present case, two eyewitnesses identified defendant purchasing gasoline. Additionally, the eyewitness identification was merely part of the substantial amount of evidence implicating defendant in the present case. The jury was able to consider any weaknesses in the eyewitness identification of defendant and adjust the weight to be given that evidence accordingly.

Defendant further claims that he was not proven guilty beyond a reasonable doubt because the State's evidence that he confessed to setting the fire is unreliable. Defendant points to the lack of any audio or video recordings of his confessions as evidence that the confessions never took place. The officers involved in defendant's interrogation testified that defendant confessed to the setting the fire on two separate occasions-- first to Sergeant Garrity and next to Detective

Dwyer. In addition to the officer's testimony that defendant confessed to setting the fire, the confessions were consistent with one another, and they were also consistent with the physical evidence gathered at the scene of the fire. Also, defendant's confession led the police to the gasoline can, an additional piece of evidence which the police had not found prior to the confession.

There was overwhelming evidence implicating defendant presented at trial. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence on which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

V. Sentencing Errors

A. *Victim Impact Evidence*

Defendant contends that improper victim impact evidence was presented at trial and during sentencing. During the State's case in chief at the guilt phase of defendant's trial, several witnesses testified to improper victim impact evidence. Ollie May Dodds testified that her daughter, Johnnie Dodds, who died in the fire, had been a nurse in the army and at the time of the fire was a counselor for Alcoholics Anonymous. Defense counsel's objection to this testimony was sustained. Debra McFadden, the sister of Robert Stevens, who also died in the fire, testified that Robert worked as a mental health counselor for various organizations and that he had two sons at the time of the fire. Defense objection to this testimony was also sustained.

Evidence concerning the background or family of a murder victim constitutes reversible error when it appears to have been presented by the prosecution in such a way as is calculated to give the jury the impression that it is relevant and material evidence on

the question of defendant's guilt or innocence. (*People v. Hayes* (1990), 139 Ill.2d 89, 141; *People v. Barrow* (1989), 133 Ill.2d 226, 274-75.) These incidences of improper victim impact evidence were brief and isolated. The prosecutor did not dwell on the subject in such a way that the jury would understand this evidence was material to defendant's guilt or innocence. In any event, the prompt sustaining of an objection by a trial judge is ordinarily sufficient to cure any error in a question or answer before the jury. (*People v. Howard* (1991), 147 Ill.2d 103, 149; *People v. Baptist* (1979), 76 Ill.2d 19, 30.) Accordingly, the limited victim impact evidence that reached the jury during trial does not warrant reversal.

Regarding defendant's claim that the State improperly admitted victim impact during the sentencing phase of defendant's trial, this claim was rejected in *Howard*:

> "In *Payne [v. Tennessee* (1991), 502 U.S. ___, 115 L. Ed. 2d 720, 111 S.Ct. 2597,] the Court declared that 'a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.' (*Payne*, 501 U.S. at ___, 115 L. Ed. 2d at 735, 111 S.Ct. at 2608.)

> We agree with the Court that such evidence is relevant to a consideration of the appropriate punishment for a capital defendant. Accordingly, we now choose to align ourselves with the Court rule on this subject."
> (*Howard*, 147 Ill.2d at 158.)

Defendant has not persuaded us to depart from our reasoning in *Howard*.

B. *Morgue Photographs*

Defendant contends that the admission of morgue photographs at the guilt phase of trial and at sentencing was prejudicial error. The photographs depicted the bodies of victims Johnnie Mae Dodds and Robert Stevens.

Defendant claims that the photographs should not have been admitted at the guilt phase of defendant's trial because the cause of death or identity of the victims was not contested. This claim is without merit. When a defendant in a murder trial pleads not guilty, the prosecution is allowed to prove every element of the crime charged and every relevant fact, even if the defendant offers to stipulate to those same facts. (*People v. Henderson* (1990), 142 Ill.2d 258, 319.) Absent some other valid objection, therefore, the photos were admissible to establish the cause of death and the identity of the victims.

Defendant next claims the photographs were unduly gruesome, and that they were likely to inflame the jurors' passions. "If photographs are relevant to prove facts at issue, they are admissible and can be

shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probativeness is outweighed." (*Henderson*, 142 Ill.2d at 319.) It is the function of the trial court to weigh the probative value and potential prejudicial effect of photographic evidence, and the decision of the court will not be reversed absent an abuse of discretion. (*People v. Redd* (1990), 135 Ill.2d 252, 320.) The trial judge ruled that the photographs were not unduly prejudicial and allowed their admission. The photographs are not included in the record, and therefore, we are unable to say that the trial judge abused his discretion in allowing their admission.

Defendant also claims that it was error to allow the photographs to be resubmitted to the jury during the death penalty phase of his trial, and that defense counsel was ineffective under *Strickland*, 466 U.S. 668, 80 L. Ed.2d 674, 104 S.Ct. 2052, for failing to object to this resubmission. At the death penalty hearing, the nature of the crime and the character of the accused are considered. (*People v. Salazar* (1988), 126 Ill.2d 424, 467.) Although the photographs may be disturbing, the jury had already seen the photographs during the guilt phase of trial and the photographs were an accurate representation of the result of defendant's crime. Allowing the jury to see how the victims died was relevant to the nature of the crime. (See *People v. Franklin* (1990), 135 Ill.2d 78, 110 (it was not error to submit, during the second phase of a death penalty hearing, three color photographs depicting the body of the victim at the murder scene because the photographs were probative of the violent nature of the criminal act and were corroborative of the trial testimony).) Because the photographs were properly resubmitted during

defendant's death penalty hearing, it could not be ineffective assistance for defense counsel to fail to object to their resubmission.

C. *Death Penalty Hearing Instructions*

Defendant claims that he was denied the right to a fair sentencing hearing because the trial court failed to instruct the jury during the eligibility phase that the only alternative to the death sentence is natural life imprisonment without the possibility of parole. This court considered and rejected this argument in *People v. Lear* (1991), 143 Ill.2d 138, 1512, and we decline to reconsider that holding here.

D. *Death Penalty Hearing Arguments*

Defendant claims that the prosecutor repeatedly made improper arguments and misstated the law during defendant's sentencing hearing. Defendant asserts, therefore, that this cause should be remanded for a new sentencing hearing.

Defendant first notes several instances where the prosecutor allegedly misstated the law. During the mitigation phase of sentencing, the prosecutor stated that "the fact that the defendant has no prior convictions is not mitigating because of the nature and the severity of the crime." Defense counsel's objection to this comment was sustained. The prosecutor then stated that "the defendant's work history, his education background, belief in God, helping others in doing good deeds" are "not mitigating." The trail court again sustained defense counsel's objection, and instructed the jury that those factors are mitigating under the law.

"In reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety and the complained-of comments must be placed in their proper

context." (*People v. Cisewski* (1987), 118 Ill.2d 163, 175-76.) Just prior to stating that the various acts of defendant "were not mitigating," the prosecutor stated that the mitigating factors presented by the defense were not sufficiently mitigating to preclude imposition of the death penalty. Additionally, after the trial judge stated that defendant's evidence was mitigating under the law, the prosecutor responded to the jury, "I say to you that it is not mitigation sufficient to preclude imposition of the death penalty." The context in which the prosecutor's comments were made shows that by "not mitigating," the prosecutor meant "not sufficiently mitigating under the circumstances of this case." The comments by the judge and the prosecutor would have made this distinction evident to the jury.

Defendant also claims that the prosecutor's statement during rebuttal that "if [defendant's] good outweighs the bad that you know about, then you should let him go," was a misstatement of the law. Defense counsel's objection to this statement was overruled. Defendant claims that the good does not have to outweigh the bad, but that the good need only be sufficient to militate against the imposition of death. We agree. We do not, however, believe that this misstatement warrants remanding this cause for a new sentencing hearing. At the conclusion of the hearing, the jury was correctly instructed as to the applicable law. The instructions explained that defendant could be sentenced to death only if the jury could unanimously find that there were not mitigating factors sufficient to preclude imposition of the death penalty. We do not believe that, given the instruction provided to the jury prior to its deliberation, the isolated comment by the prosecutor prejudiced defendant. Accordingly, the

misstatement of law by the prosecutor was harmless error.

Defendant next asserts that the prosecutor improperly implied that defendant would commit violent acts in the future if not put to death. During his final argument, the prosecutor stated that "it would be unfair for me to predict that he will set fire to a mattress and kill seven inmates as it would be for them to say he won't. We can't predict the future, so don't you try." "[C]ommenting that the defendant may kill while in prison may cause the jury to focus 'upon a speculative possibility that may or may not occur,' and that is immaterial to the jury's consideration of aggravating and mitigating factors." (*People v. Hooper* (1989), 133 Ill.2d 469, 500, quoting *People v. Walker* (1982), 91 Ill.2d 502, 515.) Comments which are invited by opposing counsel, however, are generally appropriate. (*United States v. Young* (1985), 470 U.S. 1, 12, 84 L. Ed.2d 1, 10-11, 105 S.Ct. 1038, 1044-45; *People v. Howard* (1991), 147 Ill.2d 103.) In the present case, the prosecutor's comment was in direct response to an argument made by defense counsel in his closing argument. Defense counsel claimed that defendant's outbreak of violence was an isolated instance brought on by a special set of circumstances which would not occur again. In response to this argument, the prosecutor stated that neither he nor defense counsel should engage in such speculation. We believe that the prosecutor's response was invited by the argument of defense counsel, and therefore, defendant cannot claim that the response was error.

Defendant next claims that the State's closing argument served to diminish the jury's sense of responsibility regarding its role in the imposition of the

death penalty. During closing argument, the prosecutor stated to the jury "[y]ou must follow the law. And in so doing you are not killing anyone." This comment was in response to defense counsel's plea during his opening statement that the jury not return a verdict which would kill the defendant. Defense counsel was objecting to the label put on a sentence of death. The jury would not be "killing" defendant in the same manner that defendant "killed" the victims of the fire; instead, the prosecutor was urging the jury to follow the law. While following the law might ultimately result in defendant's death, labeling the jury's action as "killing" was inappropriate. Because defense counsel invited the prosecutor's response, that response was not error.

Defendant also claims that the State misstated the evidence by arguing that defendant had a relative who would "look out" for defendant in prison. The prosecutor stated that "[defendant] has help. You heard he has relatives over in Division 6--those people are going to look out for him." One of defendant's mitigation witness, Jack Smith, Jr., was defendant's cousin and a correctional officer at the Cook County jail where defendant was held prior to trial. Defendant claims that he would not stay in Cook County jail if sentenced to life imprisonment, and there was no evidence that Smith would "look out" for him. As we stated earlier, comments of the prosecutor made during closing argument must be examined in context. (*Cisewski*, 118 Ill.2d at 175-76.) The comment regarding defendant's relative was made during the prosecutor's response to defendant's assertion that he had been well-behaved while in jail awaiting trial. The prosecutor stated that defendant's good behavior meant little because defendant knew such behavior would

eventually be used as mitigating evidence in a death penalty hearing. The prosecutor then made the statement at issue. The statement referring to defendant's relative was an explanation of defendant's good behavior in prison prior to trial, it was not an attempt to convey the idea that, if sentenced to life imprisonment, defendant would be accorded special treatment.

Finally, defendant claims that the prosecutor's characterization of defendant as a "little weasel" was error. Defense counsel's objection to this statement was sustained. Defendant claims that the prejudice he suffered as a result of this statement could not be cured by an objection, and cites *People v. Garreau* (1963), 27 Ill.2d 388, in support of his contention. In *Garreau*, "[t]he prosecutor referred to the defendant as a pervert, a weasel and a moron; told the jury that the defendant, who raped his mother's friend, would rape a dog and would rape each and every member of the jury ***." (*Garreau*, 27 Ill.2d at 391.) We believe *Garreau* is distinguishable from the present case. Here, the prosecutor was discussing defendant's alleged rock throwing incident with Patricia Phiefer. The prosecutor stated that instead of waiting to speak with Phiefer after he had thrown a rock through her window, the "little weasel" ran away. While this type of name calling is inappropriate, we believe that any prejudice to defendant was cured when the trial court sustained defendant's objection. *People v. Franklin* (1990), 135 Ill.2d 78, 100.

E. *State's Rebuttal Argument*

Defendant alleges that the State should not have been allowed to make a rebuttal closing argument at the second stage of the capital sentencing hearing. Defendant acknowledges that this court has held that it is proper for the State to make a rebuttal closing argument

at a death sentencing hearing (*People v. Caballero* (1984), 102 Ill.2d 23, 47-48), but asks that we now overrule the *Caballero* decision. We do not find defendant's arguments persuasive, and therefore decline to reconsider *Caballero*.

F. *Death as a Disproportionate Punishment*

Defendant contends that in light of the substantial mitigating evidence, the imposition of the death penalty was disproportionate punishment. Defendant called 27 witnesses in mitigation. These witnesses established that defendant came from a broken home, helped support his family while growing up, was generally helpful, was a good student and an excellent athlete, and was well-behaved in jail while awaiting his trial. While these mitigating factors are substantial, defendant's crime was exceptionally brutal and heinous. Because defendant could not stand to see his wife and child with another man, while he wanted to be with another woman, defendant set fire to an apartment building resulting in the deaths of his wife and son, and five innocent persons. This crime was not done in the heat of passion, but was premeditated and based on selfish motivation.

It is the function of the jury to balance all the factors in aggravation and mitigation (*People v. Gacy* (1984), 103 Ill.2d 1, 102), and the decision of the jury will not be overturned where the record shows that its determination was reached on a logical basis (*People v. Walker* (1985), 109 Ill.2d 484, 506.) Only where there are highly unusual circumstances will a death sentence imposed following a proper hearing be disturbed on the basis that mitigating factors should have precluded its imposition. (*People v. Neal* (1985), 111 Ill.2d 180, 200.) We do not believe that such unusual circumstances

exist in the present case, and we decline to vacate defendant's sentence.

VI. Constitutionality of the Illinois Death Penalty Statute

Defendant raises several challenges to the constitutionality of the Illinois death penalty statute. All challenges raised by defendant have been addressed previously by this court and rejected, and defendant does not persuade us to reach a different result here.

Defendant first claims that the unlimited discretion vested in the prosecutor to request a death penalty hearing violates the eighth and fourteenth amendments. This claim was rejected in *People ex rel. Carey v. Cousins* (1979), 77 Ill.2d 531, 534-43. Defendant next claims that the death penalty statute's requirements concerning the presentation and evaluation of mitigating evidence violates the prohibition against nondiscretionary capital sentencing. Defendant claims that if no mitigating evidence is shown, the jury is obligated to sentence a defendant to death. The substance of this claim was rejected in *People v. Howard* (1991), 147 Ill.2d 103, where this court held that the determination of the jury in a death penalty hearing is a balancing process, and no burden of proof is allocated to the prosecution or defense. Finally, defendant claims that the death penalty statute as a whole lacks adequate safeguards to prevent the arbitrary or capricious imposition of the death penalty. This court has stated that if the individual aspects of the statute are constitutional, then it follows that the whole is constitutional. (*People v. Gosier* (1991), 145 Ill.2d 127, 165.) Defendant claims that the cumulative aspects of the statute render it arbitrary, but defendant has not shown that any individual aspect of the statute is unconstitutional.

For the stated above, we reject defendant's contention that the Illinois death penalty statute is unconstitutional.

CONCLUSION

The judgment of the circuit court of Cook County is affirmed. The clerk of this court is directed to enter an order setting Wednesday, September 21, 1994, as the date on which the sentence of death is to be carried out. The defendant shall be executed in the manner provided by law (725 ILCS 5/119-5 (West 1992)). The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution where defendant is now confined.

Affirmed.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, IL 62706
(217) 782-2035
May 27, 1994

Mr. Michael H. King
Ross & Hardies
150 N. Michigan Avenue S2500
Chicago, IL 60601

No. 71184 - People of the State of Illinois, appellee, v. Madison Hobley, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 6, 1994.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
VS.	)	NO.: 87CR-2356
MADISON HOBLEY	)	

JUDGMENT AND EXECUTION ORDER

This day come the People of the State of Illinois by CECIL A. PARTEE, State's Attorney of Cook County, by and through his assistants, PAUL TSUKUNO and GEORGE VELCICH and also comes the defendant MADISON HOBLEY in his own proper person as well as by his attorneys, JULIE HARMON, CLYDE LEMONS and JEFF HOWARD.

And now it appears that the defendant, MADISON HOBLEY has been found guilty of murders of ANITA HOBLEY, PHILIP HOBLEY, SHERLON HOLTON, SCHALISE LINDSEY, ROBERT STEPHENS, JOHNNY MAE DOBBS and ANTHONY BRADFORD and in the manner and form as charged in the indictment.

And it further appears that this cause came to be heard before a jury on August 4, 1990 and the jury

having heard evidence and arguments of counsel has found that the aggravating factors set forth in Chapter 38, Section 9-1 Subsection (b) 3 & 6, Illinois Revised Statutes to exist, to wit:

The defendant, MADISON HOBLEY had attained the age of 18 or more at the time he committed the offense of murder; and the defendant has been convicted of murdering two or more individuals, during the commission of a felony of aggravated arson.

The jury having considered the factors in aggravation and mitigation which are relevant to the imposition of the death penalty and has found no mitigating factor sufficient to preclude the imposition of the death sentence and has directed the sentence of death for the defendant, MADISON HOBLEY.

The court fixes the sentence of the defendant MADISON HOBLEY at death on Indictment No. 87CR-2356 for the murders of ANITA HOBLEY, PHILIP HOBLEY, SHERLON HOLTON, SCHALISE LINDSEY, ROBERT STEPHENS, JOHNNY MAE DOBBS and ANTHONY BRADFORD.

IT IS HEREBY ORDERED AND ADJUDGED by the Court that the defendant, MADISON HOBLEY is hereby committed to the custody of the Sheriff of Cook County, Illinois, to be taken from the bar of this Court to the County Jail of Cook County, Illinois, from whence he came and thereafter to be transported by the Sheriff of Cook County to Illinois Department of Corrections, Stateville Correction Center, at Joliet, Will County, Illinois and there to be turned over to the Warden of the Stateville Correctional Center in safe and secure custody until January 6, 1991 and that said defendant, MADISON HOBLEY on that day at the Illinois Department of Corrections, Stateville Correctional Center

at Joliet, Will County, Illinois, shall be put to death and executed by a continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbituate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice. The warden of the Stateville Correctional Center shall supervise such execution which shall be conducted in the presence of two (2) physicians and six (6) other witnesses who shall certify the execution of the sentence which certification shall be filed with the Clerk of the Circuit Court of Cook County, Illinois, pursuant to Ill. Rev. Stat. Chapter 38, Section 119-5.

IT IS FURTHER ORDERED by the Court that the execution of the sentence of death imposed upon MADISON HOBLEY, the defendant, be and the same is hereby stayed until final order by the Supreme Court of the State of Illinois.

Now at this time, the court fully advises said defendant, MADISON HOBLEY, that an appeal to the Illinois Supreme Court is automatically perfected without any action by the defendant or his counsel and, that if he is indigent, he has the right to be furnished without cost to him a transcript of the proceedings at his trial and with counsel on appeal.

ENTER: /s/
JUDGE CHRISTY BERKOS
Judge of the Circuit Court of Cook County, Illinois

DATED: October 9, 1990

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

730 ILCS 5/3-3-3. Eligibility for parole or release

§ 3-3-3. Eligibility for Parole or Release.
(a) Except for those offenders who accept the fixed release date established by the Prisoner Review Board under Section 3-3-2.1, every person serving a term of imprisonment under the law in effect prior to the effective date of this amendatory Act of 1977 shall be eligible for parole when he has served:

(1) the minimum term of an indeterminate sentence less time credit for good behavior, or 20 years less time credit for good behavior, whichever is less; or

(2) 20 years of a life sentence less time credit for good behavior; or

(3) 20 years or one-third of a determinate sentence, whichever is less, less time credit for good behavior.

(b) No person sentenced under this amendatory Act of 1977 or who accepts a release date under Section 3-3-2.1 shall be eligible for parole.

(c) Except for those sentenced to a term of natural life imprisonment, every person sentenced to imprisonment under this amendatory Act of 1977 or given a release date under Section 3-3-2.1 of this Act shall serve the full term of a determinate sentence less time credit for good behavior and shall then be released under the mandatory supervised release provisions of paragraph (d) of Section 5-8-1 of this code.

(d) No person serving a term of natural life imprisonment may be paroled or released except through executive clemency.

(e) Every person committed to the Juvenile Division under Section 5-10 of the Juvenile Court Act or Section 5-33 of the Juvenile Court Act of 1987 or Section 5-8-6 of this code and confined in the State correctional institutions or facilities if such juvenile has not been tried as an adult shall be eligible for parole without regard to the length of time the person has been confined or whether the person has served any minimum term imposed. However, if a juvenile has been tried as an adult he shall only be eligible for parole or mandatory supervised release as an adult under this Section.

730 ILCS 5/5-8-1. Sentence of Imprisonment for Felony

§5-8-1. Sentence of Imprisonment for Felony

(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for first degree murder,

(a) a term shall be not less than 20 years and not more than 60 years, or

(b) if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or, except as set forth in subsection (a)(1)(c) of this Section, that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment, or

(c) if the defendant,

(i) has previously been convicted of first degree murder under any state or federal law, or

(ii) is found guilty of murdering more than one victim,

(iii) is found guilty of murdering a peace officer or fireman when the peace officer or fireman was killed in the course of performing his official duties, or to prevent the peace officer or fireman from performing his official duties, or in retaliation for the peace officer or fireman from performing his official duties, and the defendant knew or should have known that the murdered individual was a peace officer or fireman, or

(iv) is found guilty of murdering an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, when the employee was killed in the course of performing his official duties, or to prevent the employee from performing his official duties, or in retaliation for the employee performing his official duties, or

(v) is found guilty of murdering an emergency medical technician-ambulance, emergency medical technician-intermediate, emergency medical technician-paramedic, ambulance driver or other medical assistance or first aid person while employed by a municipality or other governmental unit when the person was killed in the course of performing official duties or to prevent the person from performing official duties or in retaliation for performing official duties and the defendant knew or should have known that the murdered individual was an emergency medical technician-ambulance, emergency medical technician-intermediate, emergency medical technician-paramedic, ambulance driver, or other medical assistant or first aid personnel, **the court shall sentence the defendant to a term of natural life imprisonment.** For purposes of this clause (v), "emergency medical technician-paramedic", have the meanings ascribed to

them in the Emergency Medical Service (EMS) Systems Act.

(1.5) for second degree murder, a term shall be not less than 4 years and not more than 20 years;

(2) for a person adjudged a habitual criminal under Article 33B of the Criminal Code of 1961, as amended, the sentence shall be a term of natural life imprisonment.

(3) except as otherwise provided in the statute defining the offense, for a Class X felony, the sentence shall be not less than 6 years and not more than 30 years;

(4) for a Class 1 felony, other than second degree murder, the sentence shall be not less than 4 years and not more than 15 years;

(5) for a Class 2 felony, the sentence shall be not less than 3 years and not more than 7 years;

(6) for a Class 3 felony, the sentence shall be not less than 2 years and not more than 5 years;

(7) for a Class 4 felony, the sentence shall be not less than 1 year and not more than 3 years.

(b) The sentencing judge in each felony conviction shall set forth his reasons for imposing the particular sentence he enters in the case, as provided in Section 5-4-1 of this Code. Those reasons may include any mitigating or aggravating factors specified in this

Code, or the lack of any such circumstances, as well as any other such factors as the judge shall set forth on the record that are consistent with the purposes and principles of sentencing set out in this Code.

(c) A motion to reduce a sentence may be made, or the court may reduce a sentence without a motion, within 30 days after the sentence is imposed. A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed within 30 days following the imposition of sentence. However, the court may not increase a sentence once it is imposed.

If a motion filed pursuant to this subsection is timely filed within 30 days after the sentence is imposed, the proponent of the motion shall exercise due diligence in seeking a determination on the motion and the court shall thereafter decide such motion within a reasonable time.

If a motion filed pursuant to this subsection is timely filed within 30 days after the sentence is imposed, then for purposes of perfecting an appeal, a final judgment shall not be considered to have been entered until the motion to reduce a sentence has been decided by order entered by the trial court.

A motion filed pursuant to this subsection shall not be considered to have been timely filed unless it is filed with the circuit court clerk within 30 days after the sentence is imposed together with a notice of motion, which notice of motion shall set the motion on the

court's calendar on a date certain within a reasonable time after the date of filing.

(d) Except where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment. For those sentenced under the law in effect prior to February 1, 1978, such term shall be identified as a parole term. For those sentenced on or after February 1, 1978, such term shall be identified as a mandatory supervised release term.

(e) A defendant who has a previous and unexpired sentence of imprisonment imposed by another state or by any district court of the United States and who, after sentence for a crime in Illinois, must return to serve the unexpired prior sentence may have his sentence by the Illinois court ordered to be concurrent with the prior sentence in the other state. The court may order that any time served on the unexpired portion of the sentence in the other state, prior to his return to Illinois, shall be credited on his Illinois sentence. The other state shall be furnished with a copy of the order imposing sentence which shall provide that, when the offender is released from confinement of the other state, whether by parole or by termination of sentence, the offender shall be transferred by the Sheriff of the committing county to the Illinois Department of Corrections. The court shall cause the Department of Corrections to be notified of such sentence at the time of commitment and to be provided with copies of all records regarding the sentence.

(f) A defendant who has a previous and unexpired sentence of imprisonment imposed by an Illinois circuit court for a crime in this State and who is subsequently sentenced to a term of imprisonment by another state or by any district court of the United States and who has served a term of imprisonment imposed by the other state or district court of the United States, and must return to serve the unexpired prior sentence imposed by the Illinois Circuit Court, may apply to the court which imposed sentence to have his sentence reduced.

The circuit court may order that any time served on the sentence imposed by the other state or district court of the United States be credited on his Illinois sentence. Such application for reduction of a sentence under this subsection (f) shall be made within 30 days after the defendant has completed the sentence imposed by the other state or district court of the United States.

(2)

No. 94-0399

FILED
OCT 24 1994
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MADISON HOBLEY,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should undertake review of the decision of the Illinois Supreme Court in this case, when, at the second stage of the capital sentencing hearing, the stage at which the sentence was determined, the jury was fully instructed that in a multiple murder case the only alternative sentence to death was natural life imprisonment without parole, only alterable by executive clemency on the part of the governor.

Whether this Court should decline to review the decision of the Illinois Supreme Court in this case since there was no violation of *Brady v. Maryland* here, where the alleged fingerprint report was not shown to have existed, and where, even assuming that it had existed, the illinois Supreme Court properly decided the case on the basis of this Court's decisions in *Youngblood v. Arizona* and *California v. Trombetta*.

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THIS HONORABLE COURT SHOULD DECLINE TO UNDERTAKE REVIEW ON CERTIORARI OF THE DECISION OF THE ILLINOIS SUPREME COURT IN THE INSTANT CASE SINCE AT THE SECOND STAGE OF THE ILLINOIS BIFURCATED SENTENCING HEARING, THE STAGE AT WHICH THE JURY MUST DETERMINE IF DEATH IS AN APPROPRIATE SENTENCE IN THIS PARTICULAR CASE, THE JURY WAS INSTRUCTED THAT DEFENDANT, HAVING BEEN FOUND GUILTY OF MULTIPLE MURDERS, WOULD BE SENTENCED TO NATURAL LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE IF THE JURY DID NOT SENTENCE HIM TO DEATH. THE HOLDING OF THE ILLINOIS SUPREME COURT FINDING THE JURY TO HAVE BEEN PROPERLY INSTRUCTED IS IN COMPLETE CONFORMITY WITH DECISIONS OF THIS COURT 10

II.

THIS HONORABLE COURT SHOULD DECLINE TO REVIEW ON CERTIORARI THE DECISION OF THE ILLINOIS SUPREME COURT IN THIS CASE FINDING THAT NO VIOLATION OF *BRADY v. MARYLAND* OCCURRED AND THAT NO EVIDENCE WAS INTENTIONALLY CONCEALED FROM DEFENDANT SINCE THAT DECISION IS COMPLETELY SUPPORTED BY THE RECORD AND IS IN CONFORMITY WITH DECISIONS OF THIS COURT. THE ALLEGED FINGERPRINT REPORT WAS NOT SHOWN TO HAVE EXISTED OR TO HAVE BEEN IN THE POSSESSION AND CONTROL OF THE PROSECUTION; IT WAS NOT SHOWN THAT THE EVIDENCE ALLEGEDLY WITHHELD WAS FAVORABLE TO THE DEFENDANT; AND IT WAS NOT SHOWN TO HAVE BEEN MATERIAL IN THAT, HAD IT BEEN AVAILABLE TO THE DEFENSE, THERE WAS A REASONABLE PROBABILITY THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT 16

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No. 94-0399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MADISON HOBLEY,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, the People of the State of Illinois, respectfully prays that this Honorable Court Deny the Petition for a Writ of Certiorari sought by the Petitioner in the instant case.

OPINION BELOW

The opinion of the Supreme Court of the State of Illinois in the instant case was filed on March 31, 1994, and is reported as *People v. Hobley*, 159 Ill. 2d 272, 637 N.E.2d 992 (1994). That court subsequently denied defendant's Petition for Rehearing on May 27, 1994.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Honorable Court under 28 U.S.C. 1257(a). However, the arguments presented by Petitioner supply no reason why this Court should undertake review of the decision of the Supreme Court of Illinois in the instant case. Here, at the second stage of the Illinois capital sentencing hearing, the stage of the hearing at which the jury must determine whether death is the appropriate penalty in this particular case, the jury was instructed that defendant, having been convicted of multiple murders, would be sentenced to natural life imprisonment without parole if he was not sentenced to death. Thus, the trial judge instructed the jury in complete conformity with this Court's holding in *Simmons v. South Carolina*, ___ U.S. ___ 114 S.Ct. 2187 (1994). Furthermore, contrary to Petitioner's position, not only is there nothing in the record to show that any concealment of evidence by the prosecution occurred in this case, there is nothing to show that the alleged evidence ever existed. Thus, this case is not governed by *Brady v. Maryland*, 373 U.S. 83 (1963), but by *Arizona v. Youngblood*, 488 U.S. 51

(1988), and *California v. Trumbetta*, 467 U.S. 479 (1984). (See Reasons For Denying The Writ, infra.) Thus no reason is presented why this Court should undertake review of the decision of the Supreme Court of Illinois in the present case. On the contrary, this Court should decline to review this case on Writ of Certiorari.

STATEMENT OF THE CASE

In his Petition, Hobley presents to this Court a fragmentary and argumentative summary of the facts in this case. Therefore, a summary of the case from its inception may be helpful here.

Madison Hobley was found guilty by a jury of the arson murders of seven persons, (R. 2513-2514), and also of aggravated arson. He was subsequently sentenced to death for the seven murders. All seven victims died in the early morning hours of January 6, 1987 in a fire which swept through a large apartment building located in Chicago, Illinois. At the time of the fire defendant lived with his wife and son in apartment 301 of that building, the apartment on the third floor closest to the front interior staircase. (R. 895-896, 970) The most extensive damage caused by the fire was at the front of the third floor, in the area of defendant's apartment. (R. 898-899) The persons who died in the fire included 24 year old Anita Hobley, defendant's wife, and 15 month old Phillip Hobley, defendant's son. (R. 1162-1164, 1199-1204) A number of other persons who were in the building at the time suffered serious, and in some cases permanent injuries.

On January 6, 1987, Andre Counsil lived less than a block from the building in which the fire occurred. (R. 774-775) Shortly after midnight, he drove to a nearby gasoline service station to visit his friend, Kenneth Stewart, who

was the attendant on duty at the time. As Mr. Counsil stood talking to his friend, he saw defendant enter the service station carrying a gasoline can. (R. 780-781) Defendant walked to the outside "booth" from which service was being rendered, asked the attendant for a dollar's worth of gasoline, then handed the attendant something. Mr. Counsel stated that the lighting conditions were excellent and that he saw defendant's full face in the bright lighting. (R. 782-783) He saw defendant go to a pump, fill the can, and walk away toward the building in which the fire shortly occurred. (R. 812-813)

Some thirty to forty five minutes later Mr. Counsil saw fire engines going by in the direction of his home, and left the service station. (R. 785) Discovering that the fire was at the nearby apartment building, he went there with several other people. There he again saw the defendant, standing about two houses West of the burning building, wearing the same clothing he had been wearing in the service station. (R. 787-788, 812-813)

The third time he saw the defendant was on a television newscast. Recognizing him as the man he had seen purchasing gasoline in a can shortly before the fire, Mr. Counsil telephoned the police and on the following day told them what he had seen. (R. 788-789)

The service station attendant also testified to the incident in which a man had purchased gasoline from him shortly before the fire, but was not able to positively identify the defendant, who he said looked like the man. (R. 1000-1008)

As a result of calls of 911, a large number of fire-fighters arrived on the scene. One of these was Peter LaMana of the Chicago Fire Department. (R. 952-953) After assisting in the rescue of a woman from the second floor and a man from the third, (R. 953-954), LaMana climbed a ladder and entered the third floor through the window from which the

man had been rescued. (R. 955) He went into the hallway and made his way to the front of the building until he reached apartment 301, the apartment occupied by defendant and his family. (R. 955-957) He found that the door to apartment 301 had been almost completely burned away, leaving only a small portion at the bottom which he kicked out of his way. (R. 955-956) Inside the apartment he saw smoke, but there appeared to be little actual fire damage. However, it was clear to him that the interior of the apartment had been subjected to intense heat. (R. 956) Just to the right of the living room window, he found the bodies of Anita and Phillip Hobley, defendant's wife and son. (R. 956, 970, 1199-1202) The firefighter noted while in the apartment that there was a strong odor of gasoline. (R. 961)

Chicago firefighter David Lamb arrived to find a great deal of smoke coming from the third floor at the front of the building. (R. 916-918) In front of the building he saw the bodies of several persons covered with blankets and, as he arrived on the scene, he himself saw a woman jump from the burning building and fall to the pavement. (R. 918-919) He and his companions found both the outer and inner front doors to the building locked, so that they had to force their way inside. (R. 191-920) Once in the inner hallway, he discovered that the stairway leading to the upper floors was in flames. He attempted to bring this fire under control for some 20 minutes, but eventually the staircase collapsed. (R. 920-924) As he worked, the firefighter smelled the clearly recognizable odor of gasoline coming from the burning stairwell. (R. 922-923)

Louis Casa, the manager of the building in question, testified that apartment 301 had been rented by Madison Hobley on November 12, 1986. (R. 900) A woman named Angela McDaniels moved into the apartment at the time, and it was Mr. Casa's understanding that she and Hobley

were living together in the apartment. He was not aware that at some time between November 12, 1986 and the day of the fire McDaniels had moved out and defendant had moved his wife and son into the building. (R. 900-901)

A number of professional fire investigators from the Chicago Police and Fire Departments conducted investigations to determine the cause of this fire. One of them was Fire Marshall Francis Burns. (R. 1059) His investigation revealed that the heaviest damage seen from the outside of the building appeared to be on the west front of the third floor. He discovered that the inside front staircase had collapsed (R. 1068-1069), and he determined that on the lower levels of the building the fire had been almost completely confined to the stairwell. (R. 1072-1076) The hardwood of the stairway risers and steps had been burned through. This was highly unusual and indicated a fire of such intense heat that it immediately suggested to him that gasoline or some other liquid accelerant had been used to start the fire. (R. 1076-1077) The burn patterns on the landings and under the landings indicated that a liquid accelerant had been poured on the stairway. (R. 1079-1082) He concluded that the liquid accelerant had been poured on the stairway and then an open flame had been set to it. (R. 1093-1096)

The front door to apartment 301 was burned away, that door having suffered the most damage of any door in the building. (R. 1112) This indicated to the investigator that gasoline had been poured on the floor in front of the door to the apartment, that it had pooled there and soaked into the floor, and that it had leaked under the door into the apartment. (R. 1112-1113)

Virgil Mikus, a police fire investigator, also concluded that the fire was started by pouring gasoline on the floor outside of apartment 301. (R. 1212-1215, 1238-1239) When

debris was later cleared from in front of the door, he discovered a circular burn pattern outside the door some four to six feet across. (R. 1215-1216) It extended into the apartment where the liquid had leaked under the door, and it extended down the stairway where the liquid had been poured down the stairs. His conclusion was that the fire was deliberately started by someone pouring gasoline outside the door of apartment 301 and then down the stairway where it was ignited.

Considerable testimony was presented concerning homicide investigation of this fire. Investigators spoke to many persons, including defendant and his "girlfriend," Angela McDaniels. The culmination of this investigation was that, after being advised of his rights and taking a lie test, defendant was told by Sgt. Patrick Garriey that the officer believed that defendant had started the fire. (R. 1131-1132) Hobley then told Sgt. Garriey that on the night of the fire he had taken a gasoline can, gone to a nearby service station on Cottage Grove Avenue, purchased some gasoline, and returned to the apartment building. (R. 1133) He splashed gasoline outside of the door of his apartment, then splashed it down the stairs, ignited it and left the building. (R. 1133-1134) He said that he did this because he was having a great deal of trouble with his girlfriend and his wife.

Shortly, investigating detectives arrived and Detective Robert Dwyer had another conversation with the defendant. Once again defendant was advised of his rights, and once again he stated that he understood them. (R. 1393-1397) Hobley then said he would speak to Dwyer. Dwyer told him that he had spoken to Angela McDaniels (the woman he had lived with for a time in apartment 301), that she was at the police station, and that the service station attendant was on his way to the police station. (R. 1398) Defendant

then once again stated that he had gone to a gasoline service station a few blocks from the apartment building, filled a can with gasoline, and taken it back to the apartment building. (R. 1398-1399) He poured gasoline outside the door of the apartment where his wife and son were, then down the stairway where he ignited it and left the building. (R. 1399) He said that he could not handle his wife anymore, and that Angela McDaniels was "where he wanted to be in his future." (R. 1400)

In his own behalf, defendant testified that in 1986 he, his wife, and his small son lived in an apartment on South Michigan Avenue in Chicago. (R. 1837) In October of that year he met a woman named Angela McDaniels at a party, began seeing her, and subsequently had an affair with her. (R. 1837-1840) In the first week in November, 1986 McDaniels moved into apartment 301 in the building which was subsequently burned, this apartment rented for her by defendant who said he did not move in but that he "stayed with" McDaniels there. (R. 1841-1842) His wife Anita found out about the affair, demanded that he break it off and, upon discovering that he had not done so, told him to move out and go live with McDaniels. (R. 1842-1844) This he did for a time. Defendant stated that he reconciled with his wife on Thanksgiving day, that shortly thereafter McDaniels moved out of the apartment, and in December 1986 he moved his wife and son into the apartment. (R. 1845-1847)

He testified that on December 31, 1986, a small fire occurred on the landing outside the door of his apartment. He stated that he thought McDaniels might have started it. (R. 1848-1853)

On the day of the fire here in question, January 6, 1987, he testified that he was awakened by the sound of a smoke alarm, and woke his wife. (R. 1865-1866) Hobley told the

jury that he went out into the hallway and down the hall a short distance, that he then discovered flames coming out of the stairwell and toward the open door of his apartment, that he was unable to get back to the apartment, and that he bent low and exited the building through a rear door. (R. 1865-1888)

John Campbell, a defense expert witness, testified that he had not visited the fire scene nor spoken to anyone who had been in the fire. (R. 2178-2182, 2216-2218) He concluded from examination of photographs and reports that in his opinion the fire had been started in the stairwell but that there had been no gasoline poured on the door of apartment 301 or on the hallway floor outside the door. (R. 2179-2184)

At the close of the voluminous evidence in this case, defendant was found guilty of the seven arson murders. (R. 2513-2517) A bifurcated Illinois capital sentencing hearing was then conducted. At the first stage of that hearing defendant was found eligible to receive the death penalty. (R. 2543-2579)

At the second stage of the capital sentencing hearing, the stage at which the jury had to determine if death was an appropriate sentence, Patricia Phiefer testified for the People that she had been a friend of Anita Hobley. (R. 2600-2601) In late November, 1986, she was called by her friend to the Hobley apartment, which was then on South Michigan Avenue. (R. 2603-2604) She found Anita Hobley alone, and was told that defendant had "abducted" little Phillip. (R. 2604-2605) Mrs. Hobley told her that she and defendant had been having marital problems. Ms. Phiefer took Anita Hobley home with her that evening. (R. 2605-2606)

On the following morning, defendant called the Phiefer apartment four times demanding to speak to his wife. (R. 2606-2608) Each time Mrs. Hobley refused to speak to him,

and each time Ms. Phiefer relayed that message to defendant. (R. 2607-2608) At about 1:30 that afternoon, a brick was thrown through Mrs. Phiefer's living-room window. (R. 2608-2609) Ms. Phiefer called the police who arrived in a few minutes. As she was speaking to the officers the telephone rang. (R. 2609) She asked the officers to pick up one extension while she picked up another. The call was from Madison Hobley. (R. 2610) Defendant asked if now she would let him speak to his wife and she replied that she would not. She thanked him for breaking her window, and he told her that she was welcome. (R. 2610) Defendant then told her that this was not all that was going to happen, that he was going to burn down the apartment building in which she lived. (R. 2611) This was corroborated by the police officer who listened to the call on the extension telephone. (R. 2620-2624) The officer had transcribed the conversation in his notebook. (R. 2624-2625) Following the fire in which the seven victims in this case were killed, this officer prepared a memorandum concerning the defendant and the incident at the Phiefer apartment. (R. 2625-2632)

Although a pre-sentence report showed that defendant had been convicted of theft in 1981, and unlawful use of a weapon in 1982, the judge ruled that neither of these convictions could be presented to the jury.

For the defense at the second stage of the sentencing hearing, a large number of witnesses testified to defendant's character, and concerning his work as a person who delivered home medical equipment to the elderly and instructed them in its use. (R. 2645-2761)

At the conclusion of this hearing, defendant was sentenced to death. (R. 2836)

REASONS FOR DENYING THE WRIT

I.

THIS HONORABLE COURT SHOULD DECLINE TO UNDERTAKE REVIEW ON CERTIORARI OF THE DECISION OF THE ILLINOIS SUPREME COURT IN THE INSTANT CASE SINCE AT THE SECOND STAGE OF THE ILLINOIS BIFURCATED SENTENCING HEARING, THE STAGE AT WHICH THE JURY MUST DETERMINE IF DEATH IS AN APPROPRIATE SENTENCE IN THIS PARTICULAR CASE, THE JURY WAS INSTRUCTED THAT DEFENDANT, HAVING BEEN FOUND GUILTY OF MULTIPLE MURDERS, WOULD BE SENTENCED TO NATURAL LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE IF THE JURY DID NOT SENTENCE HIM TO DEATH. THE HOLDING OF THE ILLINOIS SUPREME COURT FINDING THE JURY TO HAVE BEEN PROPERLY INSTRUCTED IS IN COMPLETE CONFORMITY WITH DECISIONS OF THIS COURT.

Petitioner raises two arguments before this Court in seeking Certiorari. The first of these alleges that the jury was not properly instructed at the capital sentencing hearing. The Illinois Supreme Court found here that the jury, at the second stage of the capital sentencing hearing, was properly instructed. *People v. Hobley*, 159 Ill. 2d 272, 318, 637 N.E.2d 992 (1994). A consideration of what took place at the sentencing hearing, and of applicable Illinois law, shows clearly that the jury was properly and completely instructed, and that the proceeding was in complete conformity with guidelines set out by this Court. Therefore, Petitioner's argument presents no reason why this Court should undertake to review the decision of the Supreme Court of Illinois in this case.

In Illinois, the capital sentencing hearing is divided into two parts. At the first stage of this proceeding, the eligibility stage, the jury is concerned only with whether defendant is eligible to receive the death penalty. See, Illinois Pattern

Jury Instructions, Criminal, §§7B.00 through 7B.12 (3rd Ed. 1992). In the instant case the only determination for the jury at this stage of the proceeding was whether the defendant had been convicted of the seven murders here in question and whether he was 18 years of age or older at the time he committed the murders. At the second stage of the sentencing proceeding, the jury is presented with aggravation and mitigation, and it is at this juncture that the question before the jury is whether death is the appropriate sentence under all of the facts and circumstances of this particular case. See, Illinois Pattern Jury Instructions, Criminal, §§ 7C.01-7C.09a (3rd Ed. 1992). This is in conformity with the holding of the Illinois Supreme Court that such a bifurcated hearing is preferable in capital cases. *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). It is at this second stage of the Illinois capital sentencing hearing that the jury determines the question of sentencing, whether death is an appropriate sentence in this particular case. It is at this stage of the hearing that the admonition of this Court in *Woodson v. North Carolina*, 428 U.S. 280, 304 (1986), must be followed, to the end that a complete consideration of every aspect of defendant as an individual must be taken into account. It was at this stage of the proceeding that the jury had to be fully advised as to any possible sentencing alternatives to the death penalty.

Nevertheless, during the first stage of the hearing, the eligibility stage, defendant sought to have the jury instructed that under Illinois law in a case such as this one dealing with multiple murders the only sentencing alternative to death was natural life imprisonment. The judge refused the instruction as inappropriate at that juncture. (R. 2523-2525) The jury was instructed, among other matters, that if it could not unanimously agree that defendant was eligible for the death penalty, a term of imprisonment would be imposed. However, at the second stage of the pro-

ceeding, the actual sentencing stage, the jury was fully instructed that the only alternative to the death penalty in this case was a sentence of life imprisonment without possibility of parole which could be commuted only by clemency from the governor of the state. (R. 2832) The defendant contended on appeal that he was entitled to that instruction at the eligibility stage of the sentencing hearing. The Illinois Supreme Court rejected this argument and found that the jury had been properly instructed. *People v. Hobley*, 159 Ill. 2d 272, 318, 632 N.E.2d 992 (1994). In so holding the Court followed established Illinois precedent which is in complete conformity with the holdings of this Court.

In *People v. Gacho*, 122 Ill. 2d 221, 522 N.E.2d 1146 (1988), the Illinois Supreme Court held that in cases involving multiple murders the jury must be instructed, at the second stage of the capital sentencing hearing that the only alternative to the death penalty is natural life imprisonment without possibility of parole, which may be altered only by executive clemency on the part of the state governor. This was the instruction given in the instant case. Subsequently, in *People v. Lear*, 143 Ill. 2d 138, 151, 572 N.E.2d 876 (1991), the court rejected the precise argument which was again made before it by defendant in the instant case. The court concluded (143 Ill. 2d at 151):

> "The defendant argues that the trial court erred in refusing to instruct the jury at the first stage of the sentencing hearing that the only alternative to death was natural life imprisonment. We find no merit in defendant's claim. This Court has held that at the first stage of a sentencing hearing a trial judge need not inform the jury of the particulars of the sentencing alternative that would be imposed should the defendant be found ineligible for death. [Citation.] This is because at the first phase of the sentencing hearing, the jury is concerned solely with the threshold question of whether

> defendant is even eligible for death. Only at the second phase of the hearing do actual sentencing determinations arise."

Therefore, in this case, and in any Illinois case involving multiple murders, at the stage of the proceeding at which the jury must make the actual sentencing determination they are instructed that the only alternative to death is a natural life sentence. Furthermore, that term is defined for them as indicating that defendant is ineligible for parole, but can be released only through clemency on the part of the governor of the state. This last provision is in recognition of this Court's statement that a full definition of the term natural life imprisonment without parole must tell the jury of the possibility of executive clemency. *California v. Ramos*, 463 U.S. 992 (1983). The instruction here given at the stage of the proceeding in which actual sentencing determinations were being made is in complete conformity with the decisions of this Court.

Petitioner relies almost entirely on the holding of this Court in *Simmons v. South Carolina*, ___ U.S. ___ 114 S.Ct. 2187 (1994). There, in a capital case, the future dangerousness of defendant was called into question by prosecution argument to the jury. At the sentencing proceeding at which the determination was to be made whether death was the appropriate penalty, defendant wished the jury to be instructed that life imprisonment meant that defendant could not be paroled. The rejection of this instruction was found error. This Court held that, at least in instances where the future dangerousness of defendant is called into question, such an instruction should be given so that the jury was fully informed of the alternatives to the death penalty and would not be laboring under the false impression that defendant might leave prison if he were not sentenced to death. Justices Souter, Blackmun and Stevens expressed concerns that jurors might be mislead by the

term life imprisonment, and might believe that defendant could be paroled or otherwise set free. Justice Souter in a concurring opinion stated that under the Eighth Amendment the defendant had a right to have the term defined in such a case to indicate his ineligibility for parole. This the Court found was in conformity with the requirement of the highest reliability in death penalty verdicts.

These problems obviously do not arise in the present case. In this case, the jury was informed, at the stage of the proceeding at which they were determining the sentence, that the only alternative to death was a sentence of natural life, and they were informed of exactly what that meant. No juror could have thought defendant eligible for parole, thus this misunderstanding which was a possibility in *Simmons*, could not arise here.

Petitioner seeks to apply the thinking in *Simmons* to the first stage of the sentencing hearing, the eligibility stage. Petitioner blurs the distinction between the first and second stages of the bifurcated hearing, saying that the failure of the judge to give this instruction at the first stage might have resulted in a juror imposing the death penalty rather than risk one day of freedom for the defendant. (Hobley's Petition, P. 11.) But at the first stage of the proceeding the jurors were not voting as to whether death should be imposed. They were deciding the narrow question of whether defendant was eligible for the death penalty. What they had to decide at this point was whether defendant had been convicted of more than one murder (in fact they had convicted him of seven), and whether defendant at the time of those murders was 18 years of age or over. It is simply unsupported speculation to say, as does Petitioner, that under these circumstances a juror who thought defendant ineligible for the death penalty might vote to find him eligible because he or she felt that otherwise defendant

might someday get out of prison. The point here is that the jury was fully and properly instructed at the stage of the proceeding when they were considering whether to impose the death penalty, and they were made aware of exactly what sentencing alternatives existed. Therefore, the decision of this Court in *Simmons v. South Carolina*, *supra*, does not support Petitioner's position. Quite the contrary, the situation here is one which under *Simmons* poses no threat of an improperly informed jury imposing a death sentence. This Court's demand for the highest degree of reliability in death sentencing cases was more than met here. *Mills v. Maryland*, 486 U.S. 367 (1988).

In light of all of the above, it is clear that no reason exists for this Court to undertake review of the decision of the Illinois Supreme Court in this case that the jury was properly instructed at the capital sentencing hearing. Therefore, the People respectfully pray that this Court deny Certiorari in this case.

II.

THIS HONORABLE COURT SHOULD DECLINE TO REVIEW ON CERTIORARI THE DECISION OF THE ILLINOIS SUPREME COURT IN THIS CASE FINDING THAT NO VIOLATION OF *BRADY v. MARYLAND* OCCURRED AND THAT NO EVIDENCE WAS INTENTIONALLY CONCEALED FROM DEFENDANT SINCE THAT DECISION IS COMPLETELY SUPPORTED BY THE RECORD AND IS IN CONFORMITY WITH DECISIONS OF THIS COURT. THE ALLEGED FINGERPRINT REPORT WAS NOT SHOWN TO HAVE EXISTED OR TO HAVE BEEN IN THE POSSESSION AND CONTROL OF THE PROSECUTION; IT WAS NOT SHOWN THAT THE EVIDENCE ALLEGEDLY WITHHELD WAS FAVORABLE TO THE DEFENDANT; AND IT WAS NOT SHOWN TO HAVE BEEN MATERIAL IN THAT, HAD IT BEEN AVAILABLE TO THE DEFENSE, THERE WAS A REASONABLE PROBABILITY THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT.

Petitioner states under his second argument that a fingerprint report involving a gasoline can found in the burned out building after the fire was intentionally withheld from him by the prosecution in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This simply is not true and is not born out by the record, as the Illinois Supreme Court found in its decision in this case. *People v. Hobley*, 159 Ill. 2d 272, 306-308, 637 N.E.2d 992 (1994). The determination of that court that no *Brady* violation occurred and that defendant's rights were not violated is supported by the record and is in complete conformity with decisions of this Court. Therefore, once again Petitioner presents no reason why this Court should undertake to review the well-reasoned decision of the Supreme Court of Illinois.

In its opinion, the Illinois Supreme Court found that the *Brady* decision was inapplicable; that there was no showing that the alleged fingerprint report existed; and that, assuming its existence, there was no bad faith shown on the part of the prosecution as required by this Court in decisions

such as *Arizona v. Youngblood*, 488 U.S. 51 (1988). Moreover, the court noted that there was overwhelming evidence of defendant's guilt apart from any evidence dealing with a gasoline can found on the building's second floor. Therefore, Petitioner's statement to this Court that the can was the "linchpin" of the prosecution's case is simply not true. Clearly no intentional withholding of evidence occurred here. In fact, there was not even a showing by the defense that the alleged fingerprint report ever existed.

Brady v. Maryland, supra, imposes a duty on the prosecution to disclose exculpatory evidence in its possession and control to the defendant upon defendant's specific request or, in the absence of such a request, to turn over to defendant evidence so clearly supporting a claim of innocence that in itself it gives notice to the prosecution that it should be produced. *United States v. Agurs*, 427 U.S. 97, 111 (1976). To demonstrate a violation of the *Brady* rule, defendant must show that exculpatory evidence in the possession and control of the prosecution was withheld from him, and that the evidence was material in the sense that, had it been revealed to the defense at trial, there is a reasonable probability that the outcome of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 674 (1985); *People v. Harris*, 129 Ill. 2d 123, 152, 544 N.E.2d 357 (1989). When there has been no showing that evidence favorable to the defendant has been withheld or no showing that the evidence is material in the *Brady* sense, there is no violation of defendant's rights. *Brady v. Maryland, supra*; *People v. Olinger*, 112 Ill. 2d 324, 342, 493 N.E.2d 579 (1986). Of course, the evidence must be shown to actually exist and to be within the possession and control of the prosecution. *People v. Sims*, 166 Ill. App. 3d 289, 309, 519 N.E.2d 921 (1st Dist. 1987); *People v. Morgan*, 149 Ill. App. 3d 733, 741, 500 N.E.2d 1121 (4th Dist. 1986). Defendant cannot claim concealment of evidence of which the prosecu-

tion had no knowledge at the time of the trial. *People v. Kline*, 92 Ill. 2d 490, 502, 452 N.E.2d 743 (1982).

In this case, defendant alleged in a motion for mistrial that a fingerprint report concerning a gasoline can found on the second floor of the burned out building had not been turned over to him. (R. 2282-2284) But there was no showing made that the alleged report was favorable to the defendant, much less that there was a reasonable probability that it would have altered the outcome of the trial. In fact, not only was there nothing shown as to what this alleged report might have contained, there was in fact no showing that any such report actually existed, and valid reasons for believing that it did not.

Petitioner's assertion that such a report ever existed is based on the testimony of Chicago Police Officer John Paladino. (R. 1513-1533) In one of defendant's confessions to the police, in which he admitted setting the fire and responsibility for the deaths of seven persons because he wished to rid himself of his wife and child so that he might be with his mistress, defendant had mentioned that he threw the can of gasoline he had on the second floor of the building as he fled. In light of the fact that the building had four floors, three above street level, this statement is vague, as to what he meant by second floor. However, Officer Paladino was dispatched to the second floor of the fire scene and there recovered a gasoline can from inside apartment 206. It was stipulated that chemical tests of the can showed its contents to have been gasoline. (R. 611-612) The can was before the jury for the inspection of its members. During direct examination by the prosecution, Paladino was asked if the black soot had been on the can when he recovered it. (R. 1525) He replied that he believed that the substance was fingerprint powder. He then said that the can had been taken to the crime laboratory for fingerprint testing. (R.

1525) On cross-examination, Paladino stated that he assumed the substance on the can was fingerprint powder. (R. 1529)

On the basis of nothing more than the police officer's assumption as to what the black substance on the can might have been, defendant subsequently moved for a mistrial. He contended that the prosecution had withheld evidence favorable to the defendant, a supposed fingerprint report which was allegedly made at the crime laboratory. (R. 2282-2283) One of the prosecutors then stated that he had never seen such a report and that there was no such report. (R. 2283) Although having no duty to do so, *United States v. Agurs*, *supra*; the prosecutor then opened his entire file to the defense and went through all of the documents in the file with defense counsel. (R. 2283) In particular, he had shown defense counsel all crime laboratory reports dealing with this case. No fingerprint report was to be found. The Assistant State's Attorney also pointed out that it was doubtful whether Officer Paladino's surmise that the substance on the can was fingerprint powder had any basis in fact. (R. 2284) At the end of this discussion, the trial judge denied the motion for a new trial. (R. 2284)

Thus, the only ground for Petitioner's assumption that any such report ever existed was the assumption of Paladino that the substance on the can was fingerprint powder. Yet it is quite clear that the prosecution had no such report and had made its file available to defense counsel to prove that fact. It is also clear from the question asked Paladino by the prosecutor (R. 1525), that the prosecution has assumed the dark substance on the can to be soot of some kind and had not entertained the notion that it might be fingerprint powder. Certainly a prosecutor who was attempting to conceal a fingerprint report would not ask such a question, risking the possibility that the ques-

tion of fingerprint powder might arise. The asking of this question, and the prosecutor's subsequent opening of his entire file to the defense, is persuasive evidence that the prosecution had no such report in its possession and control. Certainly there is no basis for petitioner's assumption that the prosecutor lied and got away with it. There has been no showing here that any such report existed, or even that the can was ever tested for fingerprints. Without this threshold showing, certainly no argument for a *Brady* violation can be made. If any logical assumption might be drawn from the non-existence of the report, it would appear to be that the can was not tested for fingerprints. Yet, the assumption runs throughout Petitioner's argument here that the fact that the report was not produced indicates that it must have been favorable to the defendant. As has been shown above, under the rule fashioned by this Court in *Brady v. Maryland*, evidence need be turned over to a defendant only if it is shown to be favorable to the defendant, and it is material in the sense that it might well have altered the outcome of the trial. Yet, under the assumption made by the Petitioner, any item of evidence not turned over to defendant would be presumed favorable to the defense until proven otherwise. This result was certainly never contemplated by the *Brady* decision.

In the present case, as will be seen in a moment, the Illinois Supreme Court found the *Brady* decision inapplicable and determined the issue presented on the basis that, even assuming the report existed in the first instance, it would have to be treated as lost or unpreserved evidence. As that court noted with regard to the assumption made by Petitioner, a defendant should not be rewarded for the inadvertent loss of evidence. The court determined that in a case such as this one, in which it was not clear that any report existed or what its content might be, analysis under

the *Brady* rule was inappropriate. *People v. Hobley*, *supra*, at 307.

In an apparent effort to convince this Court that the *Brady* rule should apply, Petitioner quotes out of context one phrase used by the prosecution in rebuttal closing argument at the second stage of the capital sentencing hearing, and states that this shows not only that the report existed, but that it was favorable to the defense.

Petitioner would have this Court take out of context one clause of one sentence uttered by a prosecutor during closing argument at sentencing, and elevate it to the status of a full confession that the prosecution had lied in saying that the fingerprint report did not exist, and that the contents of the report showed that defendant's fingerprints were not found on the gasoline can. But the remark, seen in context, is obviously nothing more than a piece of rhetoric, and was apparently seen as such by alert defense trial counsel who did not object to it at the time it was made, and did not ask the trial judge to reopen the question of the alleged fingerprint report on the basis of the remark. The failure to object here shows much more than a waiver of the argument before the Illinois Supreme Court, see *People v. Franklin*, 135 Ill. 2d 78, 100, 552 N.E.2d 743 (1990); it shows that to the people in the courtroom at the time the comment was made it clearly was simply rhetoric and was in no way construed as an admission that the supposed fingerprint report had ever existed.

In his rebuttal closing argument to the jury at the final stage of the sentencing hearing, the prosecutor argued that the good character testimony presented as to defendant was not sufficient to preclude imposition of the death penalty, and that what kind of person the defendant really was had been shown by the evidence presented by the prosecution at trial, and the evidence at sentencing that defendant had

also threatened to burn down the apartment of Patricia Phiefer. (R. 2808-2818) The prosecutor then said he did not know what else he could have shown to the jury to prove what sort of person Madison Hobley really was. He then stated (R. 2818); "He didn't give us a videotape of the crime. He chose not to leave his fingerprints anywhere on that can. He chose what the evidence would be, and we brought you evidence that tells you how Madison Hobley likes to solve disputes." The obvious purport of the argument was that the People had shown the jury what kind of man Hobley was, that there was nothing else they could have shown, and that what they had shown was enough to prove defendant not the kind loving person pictured by defense character witnesses. The phrase about his leaving no fingerprints on the can was rhetorical, it simply said that the prosecution had presented no fingerprint evidence. Certainly it was not an admission that a fingerprint report favorable to the defendant existed and that the prosecution had withheld it. It makes no more sense to construe this phrase in the way in which the Petitioner would have this Court do than it does to say that the argument indicates that the prosecution had a videotape of the crime which it withheld. The argument, seen as a whole, is simply that the prosecution presented enough evidence to show defendant a person deserving of the death penalty.

The Petitioner would take this one phrase in one sentence in closing argument out of context, and amplify it into an admission that a fingerprint report favorable to him existed. Petitioner would have this Court ignore the clear statement at trial by the prosecutor that no such report existed, and the good faith shown by the prosecutor in opening his entire file for defense inspection. He would have this Court ignore the question asked by the prosecutor about soot on the can which clearly showed that the prosecutor had never considered the question of the can having

been fingerprinted. But, more than this, he would build out of sheer speculation on this phrase either a showing under the *Brady* decision that evidence favorable to the defendant was deliberately withheld, or he would have an assumption drawn that the prosecution acted in bad faith, as opposed to the conclusion of the Supreme Court of Illinois drawn from the record that the prosecution had not so acted. Certainly, one may ask the common sense question of why a prosecutor, having allegedly gone to the trouble of concealing the evidence, would blurt out the fact that he had done so in open court.

Petitioner would have this Court act on his interpretation of the comment to grant Certiorari. One may presume that, were Certiorari granted, he would then use the same speculation to try to show this Court that the fingerprint report had existed and was favorable to him. But as has been shown above, the record clearly supports the finding of the Illinois Supreme Court that no showing of a violation of the *Brady* decision occurred here and that no bad faith on the part of the prosecution had occurred. Were Petitioner's reasoning followed to its ultimate end, regardless of the clear and well-reasoned opinion of the Illinois Supreme Court, regardless of the denial by the prosecution that any such report existed, and regardless of the fact that the prosecution's file had been readily opened to the defense, this comment, taken out of context, would create a presumption of the existence of a report favorable to the defense in this case.

Almost certainly in any lengthy criminal trial, remarks may be made in the rhetoric of closing argument which could be taken out of context as this remark has been. But such a ploy should not influence this Court to grant Certiorari when the record as a whole clearly supports the decision of the Illinois Supreme Court, when that decision

is in conformity with decisions of this Court, and when the speculation stands alone, unsupported by anything else in the record. The comment here in question, seen in context, was not that defendant's fingerprints had not been found on the can. It was a comment that the prosecution had shown the jury at the death penalty hearing what sort of man defendant really was, and the prosecutor did not know what other proof the People might have offered. The worst that might be said of the prosecutor is that his choice of this particular phrase was, in hindsight, unfortunate. But to interpret the phrase as an admission of the existence of the alleged fingerprint report makes no sense. It would dispense with defendant's need to show the existence of favorable and material evidence under the *Brady* decision and it would eliminate the showing of bad faith required by *Arizona v. Youngblood*, 488 U.S. 51 (1988), relied upon by the Illinois Supreme Court and discussed below.

In light of the record here and its clear showing that no report existed or, even if it ever had, that it had not been in the possession or control of the prosecution, no such speculation as that indulged in by Petitioner here could supply any reason for this Court to grant Certiorari to review the decision of the Illinois Supreme Court.

Having found *Brady* inapplicable, the Illinois Supreme Court analyzed the instant case under this Court's decisions dealing with lost or unpreserved evidence. That court concluded that no bad faith on the part of the prosecution had been shown here and that overwhelming evidence of guilt existed quite independently of any evidence having to do with the gasoline can. *People v. Hobley*, *supra*, at 307-308. Under the facts of this case, this holding was clearly correct.

In *Arizona v. Youngblood*, 488 U.S. 51 (1988); and *California v. Trombetta*, 467 U.S. 479 (1984); this Court dealt

with the question of lost or unpreserved property. Reiterating that the *Brady* rule deals only with those instances in which evidence favorable to the defendant has been withheld and that evidence is material to the extent that it might well have effected the outcome of the trial, these decisions find the *Brady* rationale not applicable to cases involving lost or unpreserved property. Noting that in the case of lost or unpreserved property the Court could say no more than that the evidence might possibly have been favorable to the defense, this Court determined that in such instances the test to be applied was whether the prosecution or police acted in bad faith in destroying the evidence, thus giving rise to the assumption that the evidence might at least have had some exculpating quality. This is obviously a completely different test than that in *Brady*, and it is the test correctly applied to this case by the Illinois Supreme Court.

In the instant case, there is not the slightest indication of bad faith. There is not even any showing here that the alleged report ever existed. But assuming that it ever did and was lost, it is clear that it was never in the possession and control of the prosecution. Petitioner, who assumes the report once existed, seeks to find bad faith in the fact that such routine reports should be preserved. But were this the standard, the requirement of a showing of bad faith would disappear from the *Youngblood* and *Trombetta* decisions, replaced with an assumption that such evidence was favorable to the defense.

Furthermore, Petitioner's attempt to distinguish this Court's *Youngblood* decision on its facts results in nothing more than a distinction without a difference. In *Youngblood*, the failure of police to keep the sexual crime victim's clothing refrigerated resulted in it being useless for semen testing. Petitioner states that the evidence was offered to

the defense but not accepted for testing and that other samples were available, thus trying to distinguish *Youngblood* from the instant case. However, the other samples were those taken from defendant. Expert witnesses testified, as this Court noted in its opinion, that a defense favorable result in semen testing might well have resulted in defendant being exonerated; certainly a more vital piece of evidence than the alleged fingerprint report here. The defense attorney had refused to test the clothing simply because it was obvious that no useful results could be obtained.

The point here is that the rule established by the *Youngblood* and *Trombetta* decisions is clear, that in the case of lost or unpreserved evidence the question is whether the prosecution acted in bad faith. This standard was properly applied to the instant case by the Illinois Supreme Court assuming, as that court said, that any such report had ever existed. No concealment or bad faith was shown here when the question asked by the prosecutor showed that he was aware of no such report, and where he opened his entire file for defense inspection. What is presented here is a clear instance of complete candor on the part of the prosecution. Thus, defendant's citation to the case of *People v. Flowers*, 51 Ill. 2d 25, 281 N.E.2d 299 (1972), as "strikingly similar" (Petition, p. 15) is not in point. That case concerned a charge of indecent liberties with a four year old girl. Defendant requested results of chemical tests on the child's clothing, but was told only that such tests had been requested. Under the facts of that case, the Illinois Supreme Court in effect found bad faith on the part of the prosecution since, the court stated, a candid reply had not been forthcoming. The prosecution there should have produced the tests, said they did not exist, or indicated they were lost. In the present case, the prosecution stated that no fingerprint report existed and candidly opened its file to the defense.

Again we note that it is clear here that no such report was in the possession of the prosecution in this case.

Nor is Petitioner correct in saying that the Illinois Supreme Court overlooked its decision in *People v. Nichols*, 63 Ill. 2d 443, 349 N.E.2d 40 (1976), in deciding this case. *Nichols* is completely inapplicable here. In that case a shoe was found near a window through which burglars had probably made entry, and near a palm print which was not that of the defendant. Defendant requested the shoe and the trial court ordered the prosecution to produce it, but it was not produced. In that case the court found what amounted to a *Brady* violation. Here, as the Illinois Supreme Court found, there was no *Brady* violation. This case was correctly decided by that court under *Arizona v. Youngblood*, *supra*; and *California v. Trombetta*, *supra*.

Petitioner cites *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971), but clearly that case has no applicability here. The *Bryant* decision, decided years before this Court's decisions in the *Youngblood* and *Trombetta* cases, attempted incorrectly to apply the *Brady v. Maryland* analysis to an instance of lost or unpreserved property. In light of subsequent decisions of this Honorable Court, clearly this case would today be considered as having been wrongly decided.

At pages 19 and 20 of his Petition, Petitioner suggests that this Court reconsider the bad faith rule established in the *Youngblood* and *Trombetta* decisions. The rule Petitioner would substitute would require a jury instruction that lost or unpreserved evidence should be presumed to have been favorable to the defendant. This is the rule rejected by this Court in its cases on point here, and there is no reason why this Court should reconsider that rule based on the facts of this case. The rule opted for by the Petitioner would eliminate the bad faith test, would ignore this Court's finding that in the case of lost or unpreserved property the

most that could be said is that the evidence might have been favorable to defendant, and would make a legal presumption that the evidence was favorable. Prior decisions of this Court such as *Youngblood* have clearly shown the Court's rejection of this position. Again, no reason is presented for the granting of Certiorari here.

Finally, Petitioner suggests that the cause should be remanded so that the defense may argue to the jury that the failure to preserve the report shows it was favorable to defendant, and that this could be evaluated by the jury in connection with the testimony of a defense expert as to the condition of the gasoline can. (Petition, at 23) As has been shown, this Court rejects the presumption which Petitioner would draw from the alleged report not being preserved. Furthermore, in this case, such an argument would be even more inappropriate since no showing that the report ever existed has been made and it is quite clear that the report was never in the possession and control of the prosecution.

The defense expert, Campbell, testified concerning the gasoline can, being limited by the court only to the extent that he was not allowed to speculate as to where in the second floor hallway the can might or might not have been at the time of the fire. The judge would permit him to testify that the can did not appear to have been subjected to great heat or smoke. The can itself was before the jury, who could see that it had apparently not been subjected to great heat or smoke. (R. 1532) On cross-examination of a prosecution expert, defense counsel asked a hypothetical question concerning a gasoline can which had born the brunt of the fire and was told that at least some remnants of it would remain. (R. 1112) Thus, the jury could determine for itself whether they thought this gasoline can could have been in the second floor hallway of the burned out building during the fire.

But the condition of the can, and Petitioner's trying to draw from the alleged existence of a fingerprint report which was supposedly lost that the fingerprint evidence would have been favorable to the defense are two entirely different matters. Certainly, there would be no reason to remand this case for a new trial.

In spite of all of Petitioner's arguments to the contrary, it is clear here that this case was properly decided by the Illinois Supreme Court on the basis of well established cases from this Court; and that the "bad faith" test was properly applied here. Since the decision reached by Illinois' highest court is correct on the record, and in complete conformity with applicable decisions of this Honorable Court, there had been no reason presented why this Court should undertake to review the decision of the Illinois Supreme Court in this case. On the contrary, clearly here Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the Respondent respectfully prays that this Honorable Court deny the instant Petition For Writ of Certiorari.

Respectfully submitted,

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